(21,238.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 186.

ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 26, 1909.

1 THE COMMONWEALTH OF KENTUCKY:

Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 27th Day of February, A. D. 1908.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY and CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD CO., Appellees.

Appeal from Franklin Circuit Court.

Be it remembered that the appellant by its attorney on the 19th day of March, 1907, filed in the office of the Clerk of the Court of Appeals, a transcript of the record, and which is in words and figures as follows, towit:

2 Pleas before the Hon. Robert L. Stout, Judge of the Franklin Circuit Court, in the Case Wherein The Commonwealth of Kentucky Was Plaintiff and Chesapeake, Ohio and Southwestern Railroad Company and Illinois Central Railroad Company Were Defendants.

3 Franklin Circuit Court.

Filed Dec. 5, 1902.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY and ILLINOIS CENTRAL RAILROAD COMPANY, Defendants.

Petition.

The Commonwealth of Kentucky complains of the defendants, Chesapeake, Ohio and Southwestern Railroad Company and Illinois Central Railroad Company, and for its cause of action states:

That prior to the first day of September, 1895, the defendant, Chesapeake, Ohio and Southwestern Railroad Company, was a corporation organized as a railroad company and operating a railroad in the State of Kentucky; that on the 15th day of September, 1895, the said Chesapeake, Ohio and Southwestern Railroad Co. by John Echols, its general manager, made and delivered to the Auditor of Public Accounts of the Commonwealth of Kentucky a statement showing among other things the name and principal place of business of the corporation, the name and official position of the officer making the report, the kind of business in which the said
4 corporation was engaged, the amount of capital stock preferred or common, and the number of shares of each, the

amount of capital stock paid up, the par and real value thereof, the fact that there were no surplus or undivided profits and the value of all other assets of the said road, the total indebtedness of the said road, the total amount of gross earnings, the net earnings or income, with the amount of tangible property in the State, where situated, assessed or liable to assessment in the State and the fair cash value thereof estimated at the price it would bring at a fair voluntary sale; and plaintiff states that for said year the Auditor of the State did not require the said defendant to report any other or additional facts; said report was made by the said defendant in conformity with the statutes of the State to enable the State Board of Valuation and Assessment to determine the value of the said defendant's franchise; and said report was thereafter duly and properly laid before the State Board of Valuation and Assessment to enable it, the said Board, to determine the value of the said franchise; and afterwards, to-wit: on the — day of ——, —, the State Board of Valuation from the facts furnished and from other information, fixed the value of the defendant's franchise within plaintiff's territorial limits at the sum of $2,081,654.00, upon which the said defendant was
5 liable for State tax at the rate of 42½ cents per hundred dollars, making a total of $8,847.03; and afterwards, to-wit: on the 20th day of January, 1898, the said corporation was duly and properly notified of said assessment and amount of tax due by it for franchise purpose; and afterwards, to-wit: on the 21st day of February, 1898, an official notice of same was duly and properly given to said company.

After the making of said report as herein set out, and prior to the institution of this action, the defendant, Illinois Central Railroad Company, by some contract between itself and its co-defendant, or the stockholders of its co-defendant, the exact terms of which are unknown to this plaintiff, acquired possession of the property of the said defendant Chesapeake, Ohio and Southwestern Railroad Company, and as a partial consideration for said acquisition covenanted to pay to the Commonwealth all taxes accrued or accruing for which the said Chesapeake, Ohio and Southwestern Railroad Company was or was to be liable, together with interest and penalties upon same. Neither of the defendants has paid to the Commonwealth the franchise tax, to-wit: $8,847.03, nor interest, nor penalty upon the same.

Wherefore plaintiff prays judgment against the defendants and each of them for said amount of taxes, with interest at the rate of ten per cent. from March 21st, 1898, and for its costs herein expended.

Paragraph 2. Further complaining of the defendants, Chesapeake, Ohio and Southwestern Railroad Company and Illinois Central Railroad Company, the Commonwealth of Kentucky for its cause of action states:

That prior to the first day of September, 1896, the defend-
6 ant, Chesapeake, Ohio and Southwestern Railroad Company, was a corporation organized as a railroad company and operating a railroad in the State of Kentucky; and that prior to that date, by some contract between itself and the Illinois Central

Railroad Company, its co-defendant, or between the stockholders in the Chesapeake, Ohio and Southwestern Railroad Company and the Illinois Central Railroad Company, the exact term of which are unknown to this plaintiff, the Illinois Central Railroad Company acquired possession of the property of the defendant Chesapeake, Ohio and Southwestern Railroad Company, and as a partial consideration for said acquisition, covenanted to pay to the Commonwealth all taxes accrued or accruing for which the said Chesapeake, Ohio and Southwestern Railroad Company was or was to be liable, together with interest and penalties upon same; and afterwards, to-wit: on the 31st day of October, 1896, the said Illinois Central Railroad Company in behalf of the Chesapeake, Ohio and Southwestern Railroad Company made to the Auditor of Public Accounts of this Commonwealth a report for franchise tax purposes, giving in detail the items set out in paragraph one herein, to which the plaintiff begs leave to refer as fully as if the same were now copied herein in words and figures; and that afterwards, to-wit: on the — day of ——, —, the Auditor of Public Accounts with his associates upon the Board of Valuation and Assessment duly and properly made an assessment of the franchise of the said Chesapeake, Ohio and Southwestern Railroad Company and found the value of said
7 franchise within plaintiff's territorial limits to be $1,946,661.00; and afterwards, to-wit: on the 20th of January, 1898, the said corporations, Illinois Central Railroad Company and Chesapeake, Ohio and Southwestern Railroad Company, were duly and properly notified of said valuation: and afterwards, to-wit: on the 21st of February, 1898, a second and official notice was given to said corporations of said valuation, but notwithstanding said fact, neither of said corporations has paid to the Commonwealth the amount of franchise tax for the year 1897, which, at 52½ cents on the hundred dollars, amounts to $10,219.97, nor the penalty upon same amounting to $1,021.99.

Wherefore, the premises considered, the Commonwealth prays to recover judgment against both of said defendants for the sum of $10,219.97, for the further sum of $1,021.99, and for its costs herein expended.

CLEM J. WHITTEMORE.
ROBT. B. FRANKLIN.

8 **Franklin Circuit Court, January 5, 1903.**

COMMONWEALTH OF KENTUCKY
vs.
CHESAPEAKE & OHIO & SOUTHWESTERN RAILROAD CO., &C.

Came the defendant, I. C. Railroad Company and filed a motion to require plaintiff to file exhibits referred to in its petition, and also a demurrer to the petition herein, which demurrer being heard is overruled, to which the said defendant excepted, and time until the 7th day of this term is given defendants to answer.

9 Franklin Circuit Court.

Filed January 5, 1903.

#23432.

COMMONWEALTH OF KENTUCKY
vs.
CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY, &c.

Motion.

Illinois Central Railroad Company moves the Court to require the plaintiff to file exhibits referred to in its petition, and papers relied on as foundation of its action—reports of companies, and pa[illegible] relied on as records of assessment.

PIRTLE & TRABUE,
For I. C. R. R. Co., Def't.

Franklin Circuit Court.

Filed January 5, 1903.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
CHESAPEAKE, OHIO & SOUTHWESTERN R. R. Co., &c., Defendants.

Demurrer of the Illinois Central R. R. Co.

10 The defendant says that the petition does not state facts sufficient to constitute a cause of action against it; wherefore it demurs generally.

PIRTLE & TRABUE,
For Illinois Central R. R. Co.

Franklin Circuit Court, January 13, 1903.

COMMONWEALTH OF KENTUCKY
vs.
CHESAPEAKE, OHIO & SOUTHWESTERN R. R. Co., &c.

Came defendant Illinois Central Railroad Company, by attorney, and filed its answer herein.

11 Franklin Circuit Court.

Filed Jan. 13, 1903.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY, &c., Defendant.

Answer of Illinois Central Railroad Company.

This defendant denies that the report mentioned in the first paragraph of the petition was made by its co-defendant in conformity with the Statutes of the State to enable the State Board of Valuation to determine the valuation of said defendant's franchise; and denies that said report was thereafter duly or properly laid before the State Board of Valuation and Assessment, or was laid before it to enable it to determine the value of said franchise; and denies that afterward at the time mentioned or any time the State Board of Valuation from the facts furnished and other information, or at all fixed the value of said defendant's Chesapeake, Ohio & Southwestern Railroad Company's franchise within plaintiff's territorial limits at the sum of $2,081,654 Dollars, or any sum, and denies that said defendant was liable for State taxes thereupon at the rate of 42½ cents or any rate, making $8,847.03, or any sum; and denies that afterwards,
12 to-wit, January 20, 1898, or at any time, said corporation was notified or duly or properly notified of said assessment or amount of tax due by it for franchise purpose; and denies that afterwards, to-wit, on February 21, 1898, or at any time, an official notice was given or duly or properly given to said company.

This defendant further denies that after the making of said report, and prior to the institution of this action or at any time, or ever, this defendant, Illinois Central Railroad Company, by some, or any contract between itself and its co-defendant acquired possession of the property of its co-defendant or as a partial consideration for said acquisition covenanted to pay to the Commonwealth all or any taxes accrued or accruing for which its co-defendant was or was to be liable, or any such taxes with interest or penalties upon the same.

This defendant for answer to Paragraph 2 denies that prior to September 1st, 1896, or at any time by some contract between itself and its co-defendant's stockholders this defendant acquired pos-ession of the property of its co-defendant, and denies that as a partial consideration for said acquisition it covenanted to pay to the Commonwealth all or any taxes accrued or accruing for which its co-defendant was or was to be liable, or any such taxes together with interest and penalties or either upon the same, and denies that afterwards,
13 to-wit, October 31, 1896 or at any time this defendant made to the Auditor of Public Accounts of this Commonwealth a report for franchise tax purposes or such report giving in detail the item set out in Paragraph 1 herein; and denies that afterward at any

Franklin Circuit Court.

EXHIBIT "A."

Edward H. Harriman to I. C. R. R. Co.

Know all men by these presents that I, Edward H. Harriman of the City, County and State of New York, do hereby appoint the Illinois Central Railroad Company, a corporation created by and organized under the law of the State of Illinois, my attorney, to take charge of the business maintenance and operation of the railroad lately belonging to the Chesapeake Ohio & Southwestern
18 Railroad Company, beginning at and in the City of Louisville in the State of Kentucky and at Elizabethtown in the County of Hardin in said State of Kentucky, and running thence to Paducah, in the State of Kentucky, and from thence to Memphis in the State of Tennessee, a distance of about four hundred miles more or less, through the counties of Jefferson, Bullitt, Meade, Hardin, Grayson, Ohio, Muhlenberg, Hopkins, Caldwell, Lyon, Livingston, Marshall, McCracken, Ballard, Graves, Fulton and Hickman in the State of Kentucky and Obion, Dyer, Lauderdale, Tipton, and Shelby in the State of Tennessee, purchased by me on the 25th, day of July, 1896 at a judicial sale made under and by virtue of a decree of the circuit court of the United States in and for the district of the State of Kentucky, and afterwards conveyed to me pursuant to a decree of said court made and entered on the 27th day of July, 1896 together with all the land, real estate, leaseholds easements, depots, station houses, shops, warehouses, carhouses, engine houses, machine shops, repair shops and all other buildings, erections and structions, and all fixtures and appurtenances belonging to the said railroad or in any wise appertaining thereto, and all other corporate property, real and personal lately belonging to the said Chesapeake, Ohio & Southwestern Railroad Company, included in the said sale and conveyance and all the rights, privileges, immunities and franchises whatsoever, which I, the said Edward H. Harriman, acquired or became entitled unto by virtue of the said sale and conveyance.

19 And I do hereby confer upon my said attorney full power and authority to use my name in nd about the business, maintenance, operation and use of the said railroad and other property; to demand, sue for and receive all the earnings of the said railroad and all monies which shall become due in respect of the business hereby entrusted to its charge, and to apply the same or so much thereof as my said attorney may see fit, to the payment of the necessary costs and expenses incurred in the management, maintenance and operation of the said railroad and other property; to make any and all contracts which may be found necessary or convenient in the management or operation of the said railroad; to appoint and employ any agents servants or other persons, at such

salary or for such compensation as my said attorney may think proper, and the same, from time to time to dismiss or discharge and any others to appoint or employ in their stead: to use my name and seal in and about any legal proceedings and suits either at law or in equity, as my said attorney may deem necessary and requisite in carrying out the objects and intents of this instrument, and in my name, and as my act and deed, to make, sign, seal, execute and deliver all such deeds, conveyances, assurances, contracts, agreements, releases, acquittances and discharges as may appear to my said attorney as may be necessary or expedient in the management of the said railroad for the business thereof: to commence, prosecute or enforce, and defend, answer or oppose, all actions or other legal proceedings touching any of the matters aforesaid, and to
20 adjust, settle, compromise or submit to arbitration any claims or demand, suits, disputed or controversies touching any of the matters aforesaid which may arise between me and any other person or persons, or between my said attorney and any other person or persons or touching any right, title or interest in or to any real estate or other property heretofore belonging to or claimed by the said Chesapeake, Ohio & Southwestern Railroad Company in which I am in any way interested: and generally to act as my attorney or agent in relation to the premises and to do all acts and things in and about the premises as fully and effectually in all respects as I myself could do if personally present.

And whereas the Illinois Central Railroad Company has heretofore, as my attorney, exercised the powers aforesaid, or some of them and has, as my attorney, made divers contracts, agreements and arrangements in my behalf in and about the premises: now therefore — do hereby ratify and confirm all the doings of the said Illinois Central Railroad Company as my attorney in all matters and things by it transacted at any time before the execution of these presents.

In witness whereof, I have hereunto set my hand and seal this 19th day of August 1896.

EDWARD H. HARRIMAN. [SEAL.]

21 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this nineteenth day of August A. D. 1896 before me, William A. Main, a Notary Public in and for the said county of New York at the City of New York aforesaid personally came Edward H. Harriman, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same freely and voluntarily for the use and purposes therein mentioned.

Given under my hand and Notarial seal the day and year first above written.

[SEAL.] WILLIAM A. MAIN,
Notary Public.

Recorded in office of Secretary of State September 15th 1896.

E. B. GUFFY,
Ass't Sec'y.

A copy. Attest:

C. B. HILL,
Secretary of State.

(Here follows facsimile of Report Jacket No. 23, marked page 22.)

Form A8. Miscellaneous Corporations and Railroads.

Chesapeake Ohio & South Western R. R. Co.

Louisville, Ky County.

"D"

REPORT FOR

September 15 ~~JUNE 30~~, ~~190~~ 1895—

Capital	$	6	700	000	00
Surplus					
Undivided Profits					
All other Assets					
TOTAL CAPITAL	$	6	700	000	00
Less Tangible Property, &c.		4	618	346	00
FRANCHISE	$	2	081	654	00
TAX	$		8	847	03

When Corporation was first notified January 20 ~~190~~ 189

Final Notice Feb. 21 — 1895 ~~190~~

When County Clerk was notified 190

Tax paid 190

REPORT No. 23

23 (Form C.)

Report of the Chesapeake, Ohio & Southwestern R. R. Company to the Auditor of Public Accounts of Kentucky, September 15th, 1895.

ARTICLE III.

§ 1. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any other public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The place or places such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Auditor,
24 Treasurer and Secretary of State, who are hereby constituted a Board of Valuation and Assessment for said purpose, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said Board, and shall convene the same from time to time, as the business of the Board may require.

§ 2. In order to determine the value of the franchise mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by section 16 of this article shall annually, between the fifteenth day of September and the first day of October, make and deliver to the Auditor of Public Accounts of the State a statement verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent in such form as the Auditor may prescribe showing the following facts, viz:

* * * * * * *

Name of Corporation—Chesapeake, Ohio & Southwestern Railroad Company.

Name the principal place of business of the corporation, company, or association you represent—Louisville, Ky.

Give the name and official position of the officer making this report:

Name, John Echols. Position, General Manager.

25 The kind of business in which the said corporation, company, or association is engaged—Common carrier,

The amount of capital stock, preferred and common, of the said corporation, company, or association, as of date Sept. 15th, 1895.

Preferred, $3,696,000.00; Common, $6,030,600.00.

Number of shares preferred and common, composing the capital stock of the said corporation, company, or association on September, 15, 1895.

Prefer-ed, 36,960; Common, 60,306.

Amount of capital stock as above paid up $9,726,600.00.

Par value of the preferred stock, as above, 3,696,000.00.

Par value of the common stock, as above 6,030,600.00.

Real value of the stock, as above—preferred, none. Common, None.

Highest price at which the stock above mentioned was sold at a bona fide sale within twelve months next before September 15, 1895.

$—— per share. No sale known.

Amount of surplus fund and undivided profits, and the value of all other assets of the said corporation, company, or association on September 15, 1895.

Surplus fund, $——. None. Undivided profits, $—— None.

Value of all other assets, $1,187,164.02.

State the total amount of indebtedness, as principal, of the said corporation, company, or association on September 15, 1895.

$4,771,345.31.

State separately the total amount of gross and net earnings, or income of said corporation, or association, including the in-
26 terest on investments, and income from all other sources for twelve months next before September 15th, 1895.

Gross earnings or income, $2,379,334.69.

Net earnings or income, 672,641.76.

Income from all other sources, 4,736.41.

Amount and kind of tangible property in this state owned by said corporation, company, or association on September 15, 1895:

Amount of tangible property. $——. See Exhibit "A."

Kind of tangible property. $——. See Exhibit "A."

State where the tangible property aforesaid is situated, assessed or liable to assessment.

City ——, County ——, Town ——. See Exhibit "A," number or name of taxing district or precinct ——.

State the fair cash value of said tangible property at the price it would bring at a fair voluntary sale. $——. See Exhibit "A."

State the total length of the entire line or lines operated, owned, leased, or controlled in this state by the said corporation, company, or association.

Specify in detail the entire length of the line or lines operated, owned, leased or controlled, as above, in each county, city, town and taxing district in this state. (Give the length of line in each county, city, town or taxing district separately.) See Exhibit "A."

Exhibit "A" is a copy of our taxation report to the Auditor of Public Accounts as of July 1st, 1895.

27 Also the total length of the entire line, or lines, as above, operated, owned, leased or controlled, as above, elsewhere than in this state. See Exhibit "A."

State the entire gross and net income or earnings received by the said corporation, company, or association in this state and out of this state on business done in this state for the twelve months next preceding September 15th, 1895:

Gross income, $1,662,412.78. Net income or earnings, $472,-335.80.

State the entire gross and net income or earnings received by said corporation, company, or association, on business done in this state and elsewhere for the same length of time.

Gross income, $2,384,071.70; net income or earnings, $677,378.17.

(Signed) JOHN ECHOLS,
General Manager.

COMMONWEALTH OF KENTUCKY,
Jefferson County, ss:

This day appeared before the undersigned, a notary public in and for the state and county aforesaid, John Echols, whose signature is attached thereto, and made oath that the statements made in answer to the above interrogatories are true to the best of his knowledge and belief.

28 Given under my hand this 15th day of October, 1895.

CRIP KREBS,
Notary Public.

My commission expires Feb. '96.

(*Copy Exhibit "A," Heretofore Referred to.*)

Chesapeake, Ohio & Southwestern Railroad Company.

John Echols and St. John Boyle, Receivers.

Office of the General Manager.

To the Auditor of Public Accounts of the State of Kentucky, Frankfort, Kentucky.

DEAR SIR: I beg herewith to submit the following report of the Chesapeake, Ohio & Southwestern Railroad Company, as to the total length and value of its track, and the kind and value of its other property in the State of Kentucky, and each county, city, incorporated town and taxing district therein, &c., as of July 1st, 1895, all of which is in pursuance — Article 4 of the Revenue and Taxation Act of the General Assembly of the State of Kentucky;

Total length of main track extending from Louisville, Kentucky, to Memphis, Tennessee, and including six miles of Branch Road between Cecilia Junction and Elizabethtown, is ——; 396:5121-5280 miles of this mileage there is in Kentucky:

29

Main line	269:5203.5280	miles
Branch line	6:	"

The mileage of main track in the state of Kentucky is distributed in the counties and incorporated towns through which the road passes as follows:

County.	Miles.	Feet.
Jefferson	19	165
Meade	2	3660
Hardin, Main line	46	296
" Branch Cecilia to Elizabethtown	6	....
Grayson	33	4230
Ohio	24	3850
Muhlenberg	26	240
Hopkins	22	1405
Caldwell	19	4805
Lyon	14	3045
Livingston	3	5122
Marshall	12	1023
McCracken	18	4746
Graves	30	1528
Hickman	3	2703
Fulton	2	65
Total	275	5203

30

Louisville, Jefferson	County	..	3815
West Point, Hardin	"	..	2666
Elizabethtown, "	"	..	3991
Big Clifty, "	"	..	3278
Leitchfield, Grayson	"	..	3350
Caneyville, "	"	..	1172
Spring Lick, "	"	..	3550
Rosine, Ohio	"	..	1926
Beaver Dam, "	"	..	2110
Hamilton, "	"	..	4974
McHenry, "	"	..	2728
Rockport, "	"	..	1876
Central City, Muhlenberg	"	1	4356
White Plains, Hopkins	"	..	2640
St. Charles, "	"	..	3624
Dawson, "	"	..	2463
Princeton, Caldwell	"	1	596
Kuttawa, Lyon	"	..	3889
Grand Rivers, Livingston	"	..	4200
Calvert City, Marshall	"	..	2328
Paducah, McCracken	"	1	4160
Hickory, Graves	"	..	2600
Mayfield, "	"	..	4000
Pryors, "	"	..	2640
Wingo, "	"	..	2530
Water Valley, "	"	..	4135
Fulton, Fulton	"	..	2310

31 The average value of this road for the purpose of being operated as a carrier of passengers and freight is:

Main Line	$8,000.00	per mile
Branch line	2,000.00	" "

making the total value of the road in Kentucky as follows:

269:5203-5280 miles main line at	$8,000.00—	$2159833.33
6:———— " branch " "	2,000.00—	12000.00

Statement of Valuation and Equipment.

Number.	Kind.	Value.
90	Locomotives	$90,000.00
26	Passenger Cars	48,880.00
3	Sleeping & Parlor	5,640.00
2	Official cars	5,640.00
16	Baggage cars	15,040.00
1	Combination car	940.00
43	Cabooses	13,545.00
1753	Freight cars (closed)	387,342.88
186	Freight cars (flat)	29,109.00
1112	Freight cars (gondola)	210,846.32
189	Freight cars (Hopper Bottom Gon.)	28,716.66
88	Freight cars (stock)	21,644.48
32		
37	Boarding cars	$7,344.87
1	Wrecking car	800.00
8	Tool cars	2,050.00
1	Pay car	940.00
1	Pile driver	700.00
2	Steam shovel	6,000.00
	Total	875,179.21

This amount divided by the total mileage (396.97 miles) makes the valuation of 2204.65 per mile for equipment, and this last amount multiplied by 275.98 (the mileage in Kentucky) gives $608,439.30, which is the amount of equipment taxable in Kentucky.

The attention of the Honorable Board of Railroad Commissioners is respectfully directed to the fact that the value, as shown in the above aggregates $16,894.87, which equipment earns no revenue, but is used exclusively in the road department.

The company's depots and other real estate and improvements are located and valued as follows:

	Louisville, Yard and grounds 14th and Kentucky			
33	Streets, Jefferson County		....	$40000.00
	Section House No. 1 and lot, Jefferson County		..	150.00
	Pleasure Ridge Park, depot and lot Jefferson Co		.....	250.00
	Muldraugh, depot and lot, Meade County		.....	250.00
	West Point, depot, section house, lots and tank,	Hardin	County....	500.00
	Vine Grove, depot and lot,	"	"	250.00
	Otter Creek, depot, lot and tank,	"	"	150.00
	Rineyville, depot and lot,	"	"	100.00
	Bethlehem, depot and lot,	"	"	250.00
	Section House # 7 and lot,	"	"	100.00
	Cecilia, depot and lot,	"	"	250.00
	Water Tank Rudes Creek,	"	"	100.00
	Elizabethtown, depot and lot,	"	"	100.00
	Section House # 7½,	"	"	100.00
	Long Grove, depot and lot,	"	"	150.00
	Stephensburg, depot and lot,	"	"	150.00
	Section House # 9 and lot,	"	"	100.00
	East View, depot and lot,	"	"	150.00
	Section House # 10 and lot,	Grayson	"	100.00
	Big Clifty, depot and lot,	"	"	200.00
	Water Tank,	"	"	100.00
	Grayson Springs, depot and lot,	"	"	250.00
	Leitchfield, depot and lot,	"	"	250.00
	Section House # 13 and lot,	"	"	100.00
	Millwood depot and lot,	"	"	250.00
	Section House # 14 and lot,	"	"	125.00
	Caneyville depot and lot,	"	"	200.00
	Wolf Pen water tank,	"	"	100.00
	Section House # 15 and lot,	"	"	100.00
34	Horse Branch depot and lot,	Ohio	County....	$150.00
	Rosiner Depot and lot,	"	"	150.00
	Section House # 17 and lot,		....	100.00
	Horton Water Tank,	"	"	100.00
	Beaver Dam, depot and lot,	"	"	250.00
	Section House # 18 and lot,	"	"	125.00
	McHenry Depot,		....	50.00
	Rockport Depot, lot and water tank,	"	"	250.00
	Section House # 19 and lot,	"	"	100.00
	Section House # 21 and lot, Muhlenberg		.....	100.00
	Central City, ½ interest in depot lot and tank,	Muhlenberg	County....	350.00
	Section House # 22 and lot,	"	"	100.00
	Greenville depot and lot,	"	"	250.00
	Section House # 23 and lot,	"	"	140.00
	Bakersport tank,	Hopkins	"	100.00
	White Plains depot and lot,	"	"	50.00
	Section House # 25 and lot,	"	"	100.00
	Nortonville, ½ interest in depot,	"	"	150.00
	St. Charles depot and lot,	"	"	150.00

Section House # 26,		"	....	20.00
Section House and lot # 28,		"	....	100.00
Dawson depot and lot,		"	....	250.00
Section House # 29 and lot,	Caldwell	"	....	100.00
Scottsburg depot and lot,	"	"	....	125.00
Princeton Depot and lot ½ interest,	Caldwell	"	....	350.00
35 Dulaney depot and lot,	Caldwell	County	....	$125.00
Section House # 32 and lot,	Lyon	"	....	100.00
Eddyville Depot and lot,	"	"	....	150.00
Kuttawa depot lot and tank,	"	"	....	300.00
Section House # 34 and lot,	Livingston	"	....	50.00
Calvert City depot and lot,	Marshall	"	....	150.00
Little Cypress tank,	"	"	....	100.00
Section House # 35 and lot,	"	"	....	100.00
Section House # 37 and lot,	McCracken	"	....	100.00
Paducah, shops, depot, &c.,	"	"	....	4200.00
Section House # 39 and lot,	"	"	....	100.00
Camp Creek Tank,	"	"	....	100.00
Boaz; depot and lot,	Graves	"	....	200.00
Section House # 40,	"	"	....	90.00
Hickory, depot and lot,	"	"	....	125.00
Mayfield, depot and lot,	"	"	....	340.00
Pryors, depot and lot,	"	"	....	175.00
Wingo, depot and lot,	"	"	....	125.00
Section House and lot,	"	"	....	100.00
Water Valley depot and lot,	"	"	....	200.00
Tank,	"	"	....	100.00
Fulton, ½ interest in passenger depot, Fulton, freight depot and lot, Fulton County			....	500.00

This company owns 224¼ miles of telegraph line in Kentucky.

36 Grayson County.

District.				
1.	2.38 miles main line at	8,000.00		$19,040.00
	Leitchfield depot and lot			250.00
18.	0.27 miles main line at	8,000.00		2,160.00
24.	2.84 miles main line at	8,000.00		22,720.00
25.	3.62 miles main line at	8,000.00		28,960.00
	Millwood depot and lot			250.00
35.	1.82 miles main line at	8,000.00		14,560.00
	Grayson Springs depot and lot.			250.00
42.	4.02 miles main line at	8,000.00		32,160.00
	Section House # 15 and lot			100.00
50.	2.32 miles main line at	8,000.00		18,560.00
52.	1.72 miles main line at	8,000.00		13,760.00
	Caneyville depot and lot, & section House # 14			325.00
58.	2.92 miles main line at	8,000.00		23,360.00
	Big Clifty depot and lot			200.00

District.				
59.	0.98	miles main line at.....	8,000.00	7,840.00
67.	0.98	miles main line at.....	8,000.00	7,840.00
		Big Clifty Water tank.....		100.00
80.	1.71	miles main line at.....	8,000.00	13,680.00
		Wolf Pen water tank.....		100.00
82.	2.14	miles main line at.....	8,000.00	17,120.00
		Section House # 13 and lot...		100.00
90.	1.26	miles main line at.....	8,000.00	10,080.00
37				
96.	2.74	miles main line at.....	8,000.00	$21,920.00
99.	1.88	miles main line at.....	8,000.00	15,040.00
		Section House # 10 and lot...		100.00
		Ohio County.		
6.	0.83	miles main line at.....	8,000.00	6,640.00
8.	1.23	miles main line at.....	8,000.00	9,840.00
10.	1.23	miles main line at.....	8,000.00	9,840.00
19.	1.28	miles main line at.....	8,000.00	10,240.00
		Section House # 19 and lot..		100.00
23.	1.87	miles main line at.....	8,000.00	14,960.00
		Horse Branch depot and lot..		150.00
30.	2.36	miles main line at.....	8,000.00	18,880.00
		Rosine depot and lot, and section H. 17.....		250.00
31.	1.16	miles main line at.....	8,000.00	9,280.00
32.	0.80	miles main line at.....	8,000.00	6,400.00
36.	1.51	miles main line at.....	8,000.00	12,080.00
41.	2.62	miles main line at.....	8,000.00	20,960.00
		Beaver Dam depot and lot, sec. house 18		375.00
75.	2.46	miles main line at.....	8,000.00	19,680.00
81.	1.19	miles main line at.....	8,000.00	9,520.00
82.	0.83	miles main line at.....	8,000.00	6,640.00
		Rockport depot, lot and tank..		250.00
106.	0.59	miles main line at.....	8,000.00	4,720.00
		McHenry depot and lot.....		50.00
38				
108.	2.01	miles main line at.....	8,000.00	$16,080.00
114.	1.24	miles main line at.....	8,000.00	9,920.00
114.	1.51	miles main line at.....	8,000.00	12,080.00
		Horton Water Tank.....		100.00

Taxable Property in Kentucky School Districts.

Jefferson County.

13.	0.47	miles main line at.....	8,000.00	$3,760.00
15.	1.06	miles main line at.....	8,000.00	8,480.00
16.	3.36	miles main line at.....	8,000.00	26,880.00

District.				
19.	1.95	miles main line at.....	8,000.00	15,600.00
22.	5.25	miles main line at.....	8,000.00	42,000.00
61.	1.38	miles main line at.....	8,000.00	11,040.00

Hardin County.

1.	1.39	miles branch line at.....	2,000.00	2,780.00
18.	1.13	miles branch line at.....	2,000.00	2,260.00
23.	1.02	miles branch line at.....	2,000.00	2,040.00
	2.59	miles main line at.....	8,000.00	20,720.00
		Cecilia lot and tank.....		350.00
22.	1.74	miles main line at.....	8,000.00	13,920.00
		Section House # 7 and lot...		100.00
24.	3.19	miles main line at.....	8,000.00	25,520.00
		Long Grove depot, and lot....		150.00
33.	1.84	miles main line at.....	8,000.00	14,720.00
39		Stephensburg depot and lot, sec. house # 9.....		$250.00
37.	3.13	miles main line at.....	8,000.00	25,040.00
		East View depot and lot.....		150.00
38.	3.06	miles main line at.....	8,000.00	24,480.00
55.	2.21	miles main line at.....	8,000.00	17,680.00
		Rineyville depot and lot.....		100.00
63.	2.89	miles main line at.....	8,000.00	23,120.00
		Vine Grove depot and lot.....		250.00
64.	1.92	miles main line depot at.....	8,000.00	15,360.00
66.	2.44	miles main line at.....	8,000.00	19,520.00
68.	1.41	miles main line at.....	8,000.00	11,280.00
69.	1.85	miles main line at.....	8,000.00	14,800.00
71.	2.07	miles main line at.....	8,000.00	16,560.00
		West Point depot, lot section House & tank.....		500.00
72.	0.50	miles main line at.....	8,000.00	4,000.00
84.	1.96	miles main line at.....	8,000.00	15,680.00
		St. John depot and lot.....		250.00
108.	1.88	miles main line at.....	8,000.00	15,040.00

Meade County.

48.	2.13	miles main line at.....	8,000.00	$17,040.00
		Muldraugh depot and lot.....		250.00
49.	0.57	miles main line at.....	8,000.00	4,560.00

Muhlenburg County.

7.	0.25	miles main line at.....	8,000.00	2,000.00
40				
9.	0.78	miles main line at.....	8,000.00	$6,240.00
11.	1.64	miles main line at.....	8,000.00	13,120.00

District.				
14.	1.50	miles main line at.....	8,000.00	12,000.00
		Greenville depot and lot.....		250.00
33.	2.26	miles main line at.....	8,000.00	18,080.00
		½ interest Central City depots & lots		350.00
37.	3.55	miles main line at.....	8,000.00	28,400.00
40.	2.03	miles main line at.....	8,000.00	16,240.00
		Section House # 21 and lot..		100.00
44.	1.70	miles main line at.....	8,000.00	13,600.00
59.	3.03	miles main line at.....	8,000.00	24,240.00
		Section House # 23 and lot..		140.00
60.	2.72	miles main line at.....	8,000.00	21,760.00
65.	1.78	miles main line at.....	8,000.00	14,240.00
		Section House # 22 and lot..		100.00
75.	2.01	miles main line at.....	8,000.00	16,080.00
81.	0.94	miles main line at.....	8,000.00	7,520.00
		Hopkins County.		
6.	0.59	miles main line at.....	8,000.00	4,720.00
22.	1.85	miles main line at.....	8,000.00	14,800.00
		½ int. in Nortonville pas. depot & lot.....		125.00
26.	0.38	miles main line at.....	8,000.00	3,040.00
		Bakersport Water tank.....		100.00
41				
34.	3.68	miles main line at.....	8,000.00	$29,440.00
		St. Charles depot and lot.....		150.00
37.	3.55	miles main line at.....	8,000.00	28,400.00
43.	2.24	miles main line at.....	8,000.00	17,920.00
		Fry depot and lot at Nortonville		25.00
47.	1.65	miles main line at.....	8,000.00	13,200.00
		Section House # 25 and lot..		100.00
56.	1.57	miles main line at.....	8,000.00	12,560.00
82.	1.03	miles main line at.....	8,000.00	8,240.00
		Dawson depot, lot and water tank		250.00
		Caldwell County.		
1.	3.71	miles main line at.....	8,000.00	$29,630.00
		½ int. in Princeton depot and lot		350.00
17.	2.21	miles main line at.....	8,000.00	17,680.00
24.	1.90	miles main line at.....	8,000.00	15,200.00
		Dulaney depot and lot.....		125.00
34.	3.27	miles main line at.....	8,000.00	26,160.00
36.	2.51	miles main line at.....	8,000.00	20,080.00
47.	2.51	miles main line at.....	8,000.00	20,080.00
		Scottsburg depot and lot.....		125.00

District.				
57.	2.73	miles main line at.....	8,000.00	21,840.00
		Section House # 29 and lot..		100.00
65.	0.74	miles main line at.....	8,000.00	5,920.00
42		Lyon County.		
6.	1.6	miles main line at.....	8,000.00	$12,800.00
7.	2.5	miles main line at.....	8,000.00	20,000.00
8.	3	miles main line at.....	8,000.00	24,000.00
		Eddyville depot and lot.....		150.00
20.	4	miles main line at.....	8,000.00	32,000.00
		Section House # 32 and lot..		100.00
23.	2	miles main line at.....	8,000.00	16,000.00
29.	1.4	miles main line at.....	8,000.00	11,200.00
		Kuttawa depot and lot, and water tank		300.00
		Marshall County.		
20.	2.39	miles main line at.....	8,000.00	18,320.00
27.	2.49	miles main line at.....	8,000.00	19,920.00
		Section House and # 35 Calvert City depot and lot....		250.00
29.	2.45	miles main line at.....	8,000.00	19,600.00
32.	2.32	miles main line at.....	8,000.00	18,560.00
		Little Cypress water tank.....		100.00
55.	0.93	miles main line at.....	8,000.00	7,440.00
		McCracken County.		
3.	2	miles main line at.....	8,000.00	16,000.00
43				
4.	2.86	miles main line at.....	8,000.00	$22,880.00
5.	2.29	miles main line at.....	8,000.00	18,320.00
		Section House # 37 and lot..		100.00
7.	2.82	miles main line at.....	8,000.00	22,560.00
		Section House # 39 and lot..		100.00
8.	2.54	miles main line at.....	8,000.00	20,320.00
		Camp Creek tank.....		100.00
12.	1.52	miles main line at.....	8,000.00	12,160.00
40.	2.11	miles main line at.....	8,000.00	16,880.00
		Hickman County.		
33.	2.56	miles main line at.....	8,000.00	20,480.00
34.	0.31	miles main line at.....	8,000.00	2,480.00
		Fulton County.		
1.	2.01	miles main line at.....	8,000.00	16,080.00
		½ int. in passenger depot, lot, freight depot, lot and tank.		500.00

Very respectfully,

____ ____,

____ ____,

Receivers.

44 STATE OF KENTUCKY,
County of Jefferson:

Personally appeared before me this — day of —— 1895, John Echols and St. John Boyle, known by me to be the receivers of the Chesapeake, Ohio & Southwestern Railroad, and made oath that the foregoing report is true to the best of their knowledge and belief.

Witness my hand and official seal this — day of —— 1895.

——— ———,
Notary Public.

45 Form A-8. 8-30-1902-500.

Report of the Chesapeake, Ohio and Southwestern R. R. Co. (Operated by Illinois Central Railroad Company, Agent) to the Auditor of Public Accounts of Kentucky, September 15, 1896.

ARTICLE III.

Assessment of Certain Corporations.

S. 1. Every Railway Company or Corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its
46 franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The place or places where such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to share of such tax, shall be determined by the Auditor, Treasurer and Secretary of State, who are hereby constituted a Board of Valuation and Assessment for said purpose, and for the discharge of such other duties as may be imposed on them by this act.

The Auditor shall be chairman of said Board, and shall convene the same from time to time as the business of the board may require.

S. 2. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by Section 16 of this article, shall annually, between the fifteenth day of September and first day of October, make and de-

liver to the Auditor of Public Accounts of this State, a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz:

Name of corporation—Chesapeake, Ohio & Southwestern Railroad Company.

Name the principal place of business of the corporation, company or association you represent—Louisville, Kentucky.

47 Give the name and official position of the officer making this report.

Name, J. C. Welling. Position, Vice President I. C. R. R. Co.—Agt.

The kind of business in which the said corporation, company or association is engaged.

Operating Railroad from Louisville, Ky. to Memphis, Tennessee.

The amount of capital stock, preferred and common, of the said corporation, company or association, as of date September 15, 1896.

Preferred, $3,696,000.00; Common, $6,030,600.00.

Number of shares, preferred and common, composing the capital stock of the said corporation, company or association, on September 15, 1896.

Preferred, 36960; Common, 60306.

Amount of capital stock, as above, paid up, $9,726,600.

Par value of the preferred stock, as above, $3,696,000.

Par value of the common stock, as above, $6,030,600.

Real value of the stock, as above, Preferred, $——; Common, ——.

The highest price at which the stock above mentioned was sold at a bona fide sale within twelve months next before September 15, 1896.

$—— per share. No sales known.

Amount of surplus fund and undivided profits, and the value of all other assets of the said corporation, company or association, on September 15, 1896.

Surplus fund, $——; Undivided profits, $——;
Value of all other assets, $129152925.

48 State the total amount of indebtedness, as principal, of the said corporation, company or association, on September 1, 1896—Bonded indebtedness, $11,104,000; Rate of interest paid, — per cent.

Other indebtedness, $5,305,024.50; amount of interest paid, $——.

Total indebtedness, $16,409,024.50;

State separately the total amount of gross and net earnings, or income of the said corporation, company or association, including interest on investments, and income from all other sources for twelve months next before September 1, 1896.

Gross earnings or income			$2,402,777.67
Less expenses	Salaries	$.....	
	Wages & other expenses of operation	$1,711,662.57	
	Interest	$648,300.00	
	Dividends	$.....	
	Enlargement of plant	$.....	
	Other expenses	$117,404.93	
Total			$2,477,367.50
Net deficit			$74,589.83

Amount and Kind of Tangible Property in This State Owned by the Said Corporation, Company, or Association on September 15, 1896.

Amount of tangible property, $2874597.

Kind of tangible property, ——.

Railroad from Louisville, Ky., to Tennessee, State line at
49 Fulton, Kentucky, including proportion of rolling stock.

State where the tangible property aforesaid is situated, assessed or liable to assessment.

County ——; City ——; Town ——; number or name of taxing district or precinct.

See Sheets "C" opposite.

State the fair cash value of said tangible property, at the price it would bring at a fair voluntary sale.

$2874597.

State the total length of the entire line or lines operated, owned, leased or controlled in this State by the said corporation, company or association.

269.99 miles of main line—6 miles of branch line.

Specify in detail the entire length of the line or lines operated, owned, leased or controlled, as above, in each county, city, town and taxing district in this State. (Give the length of line in each county, town or taxing district separately.) Also, the total length of the entire line or lines, as above, operated, owned, leased or controlled, as above, elsewhere than in this State.

12098 miles in Tennessee.

State the entire net and gross income or earnings received by the said corporation, company or association, in this State and out of this State, on business done in this State for twelve months next before September 1, 1896.

Gross income, $1,681,944.37; Net deficit, $52,212.88.

State the entire net and gross income or earnings received by the said corporation, company or association, on business done
50 in this State and elsewhere for the same length of time.

Gross income, $2,402,777.67; Net deficit, $74,589.83.

J. C. WELLING,
Vice-President Ill. Cen. R. R. Co.

(Here follows fac-simile of Report Jacket No. 33, marked page 51.)

Form A8. Miscellaneous Corporations and Railroads.

Chesapeake Ohio & South Western R. R. Co.

Louisville Ky County.

"E"

REPORT FOR

September 15-

~~JUNE 30~~, ~~190~~ 1896

Capital	$ 6	700	000	00
Surplus				
Undivided Profits				
All other Assets				
TOTAL CAPITAL	$ 6	700	000	00
Less Tangible Property, &c	4	753	339	00
FRANCHISE	$ 1	946	661	00
TAX	$	10	219	97

When Corporation was first notified June 20 ~~190~~ 96

Final Notice Feb. 21 — 1895 ~~190~~

When County Clerk was notified 190

Tax paid 190

REPORT No. 33

52 COMMONWEALTH OF ILLINOIS,
Cook County, ss:

This day personally appeared before the undersigned, a Notary Public in and for the State and county aforesaid, J. C. Welling, Vice President I. C. R. R. Co. whose signature is attached thereto, and made oath that the statements made in answer to the above interrogatories are true to the best of his knowledge and belief.

Given under my hand this 31 day of October 1896.

JULIUS L. RUNEY,
Notary Public.

NOTE.—The financial statements in this report are for 1st September 1896, as this Company is unable to make a financial report for the 15th of any month.

EXHIBIT "C."

53 *Chesapeake Ohio & Southwestern Railroad Company.*

County.	Miles main track.	Lands & buildings.	
Jefferson	19.03	40,400	
Meade	2.39	250	
Hardin Main Line	36.06	2,350	
Do. Branch	6.00	100	
Grayson	33.80	1,775	
Ohio	24.75	1,375	
Muhlenberg	26.05	940	
Hopkins	22.26	920	
Caldwell	19.91	700	
Lyon	14.57	550	
Livingston	3.97	50	
Marshall	12.20	350	
McCracken	18.90	4,500	
Graves	30.30	1,455	
Hickman	3.51	....	
Fulton	2.01	500	
Main Line	239.99		$2,209,560
Branch	3.00		27,054
		56,125	56,125
Rolling Stock			581,768
			$2,874,597

54 *In Towns and School Districts.*

County.	Miles main track.	Lands & bldgs.	Towns or school dist.
Jefferson	0.19	40,000	Louisville
	0.42	...	Dist..... 13
	1.00	...	" 15
	3.36	...	" 15
	1.95	...	" 19
	5.05	...	" 22
	1.57	...	" 61
Hardin	0.50	500	West Point
	0.76	100	Elizabethtown
Branch	1.39	100	Dist..... 1
,	1.74	100	" 22
Main Line	2.59	350	" 23
Branch	1.02	...	" .... "
	3.19	150	" 24
	1.84	200	" 33
	3.13	150	" 37
	3.03	...	" 38
	2.21	100	" 55
	2.89	250	" 63
	1.92	...	" 64
	2.44	...	" 66
	1.41	...	" 68
	1.85	...	" 69
55			
Hardin	2.07	500	Dist..... 71
	0.50	...	" 72
	1.96	250	" 84
	1.88	...	" 108
Meade	2.13	250	" 48
	0.57	...	" 49
Grayson	0.62	200	Big Cliff
	0.44	250	Leitchfeild
	0.22	425	Carryville
	0.67	...	Spring Lick
	2.94	250	Dist..... 1
	0.27	...	" 18
	2.84	...	" 24
	3.62	250	" 25
	1.82	250	" 35
	4.02	100	" 42
	2.32	...	" 50
	1.72	425	" 52
	2.92	200	" 58
	0.77	...	" 59
	1.19	100	" 67
	1.26	...	" 80
	2.14	100	" 82
	0.90	...	" 90
	2.74	...	" 96

56

County.	Miles main track.	Lands & bldgs.	Towns or school dist.
Grayson	1.88	100	Dist..... 99
Ohio	0.36	150	Rosine
	0.40	250	Beaver Dam
	0.94	...	Hamilton
	0.51	50	McHenry
	0.36	350	Rockport
	0.83	...	Dist..... 6
	1.23	...	" 8
	1.28	100	" 19
	1.23	...	" 10
	1.87	150	" 23
	2.36	250	" 30
	1.18	...	" 31
	0.80	...	" 32
	1.51	...	" 36
	2.62	375	" 41
	1.00	...	" 65
	1.46	...	" 75
	1.19	...	" 81
	0.83	350	" 82
	0.59	50	" 106
	2.01	...	" 108
	1.24	...	" 114
	1.51	100	" 115
Muhlenberg	1.82	350	Central City
	0.25	...	Dist..... 7

57

Muhlenberg	0.78	...	Dist..... 9
	1.64	...	" 11
	1.50	250	" 14
	2.26	250	" 33
	3.55	...	" 37
	2.03	100	" 40
	1.70	...	" 44
	3.03	150	" 59
	2.72	...	" 60
	1.78	100	" 65
	2.01	...	" 75
	0.94	...	" 81
	1.70	...	" 83
	0.26	...	" 84
Hopkins	0.50	50	White Plains
	0.69	150	St. Charles
	0.47	250	Dawson
	0.59	...	Dist..... 6
	1.85	150	" 22
	0.38	100	" 26
	2.18	150	" 34
	3.55	...	" 37
	2.71	...	" 38

58

County.	Miles main track.	Lands & bldgs.	Towns or school dist.
Hopkins	2.24	...	Dist. 43
	1.57	...	" 56
	1.03	250	" 82
	1.50	...	" 88
Caldwell	1.11	350	Princeton
	3.71	350	Dist. 1
	2.21	...	" 17
	1.90	125	" 24
	3.27	...	" 34
	2.51	...	" 36
	2.51	125	" 47
	2.73	100	" 57
	0.74	...	" 65
Lyon	0.72	300	Kuttawa
	1.60	...	Dist. 6
	2.50	...	" 7
	3.00	150	" 8
	4.00	100	" 20
	2.00	...	" 23
	1.40	300	" 29
Livingston	0.80	...	Grand Rivers
	3.97	50	Dist. 36
Marshall	0.44	150	Calvert City

59

Marshall	2.29	...	Dist. 20
	2.45	...	" 29
	2.49	250	" 27
	2.32	100	" 32
	0.93	...	" 55
McCracken	1.79	4,200	Paducah
	2.00	...	Dist. 3
	2.86	...	" 4
	2.29	100	" 5
	2.82	100	" 7
	2.04	...	" 8
	1.39	...	" 12
	2.11	...	" 40
	1.00	100	" 41
Graves	0.50	125	Hickory
	0.76	340	Mayfield,
	0.50	175	Pryors
	0.48	225	Wingo
	0.80	300	Water Valley
	1.70	225	Dist. 25
	2.40	300	" 26
	1.50	...	" 28
	1.50	...	" 36
	3.20	175	" 38

60

County.	Miles main track.	Lands & bldgs.	Towns or school dist.	
Graves	1.70	340	Dist.	43
	3.00	...	"	51
	1.70	...	"	66
	2.50	200	"	67
	2.00	...	"	73
	2.30	125	"	69
	1.50	...	"	86
	1.70	...	"	94
	2.00	...	"	102
Hickman	2.56	...	"	33
	0.31	...	"	34
Fulton	0.44	500	Fulton	
	2.01	500	Dist.	1

Finis.

61 Franklin Circuit Court.

January 27, 1903.

COMMONWEALTH OF KENTUCKY
vs.
CHESAPEAKE & OHIO SOUTHWESTERN R. R. Co., &c.

Ordered that this cause be now submitted.

Franklin Circuit Court.

January 29, 1903.

COMMONWEALTH OF KENTUCKY
vs.
CHESAPEAKE & OHIO & SOUTHWESTERN R. R. Co., &c.

Came defendant, Illinois Central Railroad Company, by attorney, and filed a demurrer to each paragraph of amended petition and to the petition as a whole, and this cause is now submitted on said demurrer, and continued.

62 Franklin Circuit Court.

Filed Jan. 29, 1903.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
CHESAPEAKE, OHIO & SOUTHWESTERN R. R. Co., &c., Defendants.

Demurrer.

The defendant, the Illinois Central Railroal Company, demurs to each paragraph of the petition herein as amended and to the peti-

tion and amended petition as a whole, because they do not, separately or as a whole, state facts sufficient to constitute a cause of action against this defendant.

PIRTLE & TRABUE,
HAZELRIGG & CHENAULT,
For Ill. Cen. R. R. Co.

Franklin Circuit Court.

Jan. 19, 1904.

COMMONWEALTH OF KENTUCKY
vs.
C. & O. SOUTHWESTERN R. R. Co.

63 Ordered that the above styled action be set for trial the 21st day of this term.

Franklin Circuit Court.

April 26, 1904.

COMMONWEALTH OF KENTUCKY
vs.
C. & O. S. W. RY. Co.

Order.

This cause coming on to be heard on the demurrer of the defendant Illinois Central Railroad Company, to the petition and amended petition and the Court being advised overrules same to which the said defendant excepts.

Thereupon came the defendant the Illinois Central Railroad Company and filed its answer herein.

Franklin Circuit Court.

Filed Apr. 26, 1904.

COMMONWEALTH OF KENTUCKY, Plaintiff,

64 —

CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY and ILLINOIS CENTRAL RAILROAD COMPANY, Defendants.

Answer of Illinois Central Railroad Co. to Petition as Amended.

Paragraph 1. This defendant, the Illinois Central Railroad Company, says that there is a defect of parties defendant to this action and that the Chicago, St. Louis & New Orleans Railroad Company, a corporation chartered by the Legislature of the Commonwealth of Kentucky, is and when this action was instituted was the owner of

the railroad property referred to in plaintiff's petition and each and every part thereof, and that said company became the owner thereof by deed of conveyance of the fee simple title thereof from the said Edward H. Harriman mentioned in the amended petition, on the 17th day of September, A. D. 1897, and has ever since been the owner thereof.

Wherefore this defendant pleads a defect of parties to this action.

Paragraph 2. Defendant for answer to the first paragraph of the petition as amended, denies that the property mentioned in the petition or amended petition was in lien to plaintiff for taxes mentioned or any taxes, and denies that after the report mentioned in the first paragraph of the amended petition and when the property was in lien to plaintiff for taxes Edward H. Harriman became the purchaser of said property, or the purchaser by some contract to plaintiff unknown, and denies that on the 19th day of August, 1896, the said Harriman transferred the property aforesaid, or any property of the Chesapeake, Ohio & Southwestern Railroad Company to this defendant, or so transferred it by the instrument of writing referred to in the first paragraph of said amended petition, a copy of which is filed therewith marked Exhibit A.

65

This defendant denies that by virtue of the assumed assessment of the franchise of the Chesapeake, Ohio & Southwestern Railroad Company as set out in the first paragraph of plaintiff's petition as amended or otherwise, plaintiff acquired a lien on the assets tangible or intangible of the said Chesapeake, Ohio & Southwestern Railroad Company for tax upon defendant's franchise, or for interest or penalty upon same, and denies that any such lien is a subsisting lien upon the property in the hands of this defendant.

Paragraph 3. Defendant for answer to the second paragraph of plaintiff's petition as amended denies that after the execution or delivery of the written contract set out in Paragraph 1 of said amended petition or while the Chesapeake, Ohio & Southwestern Railroad Company was being operated by its co-defendant, Illinois Central Railroad Company, as set out in said first paragraph, this defendant, Illinois Central Railroad Company, in behalf of the Chesapeake, Ohio & Southwestern Railroad Company made to the Auditor of Public Accounts a report for franchise tax purposes of the Chesapeake, Ohio & Southwestern Railroad Company; and this defendant denies that this defendant operated as alleged in said second paragraph of said amended petition the property of the said Chesapeake, Ohio & Southwestern Railroad Company, and denies that it made the report therein mentioned for franchise tax purposes, or for franchise tax purposes of the Chesapeake, Ohio & Southwestern Railroad Company.

66

Paragraph 4. This defendant for further answer to the petition as amended states that the report mentioned in the first paragraph of the plaintiff's petition as amended was filed in the office of the Auditor of Public Accounts of the Commonwealth of Kentucky, plaintiff herein, as of the 15th day of September, 1895, and on or before October 1, 1895, and that the assessment of taxes for the year 1896 might first have been made, and regularly should have been

made if at all, on or before the first of January, 1896; and that the report mentioned in the second paragraph of said petition as amended was made as of September 15, 1896, and on or before the first of October, 1896, and that the taxes for the year 1897 could first have been assessed and should have been assessed on or before the first day of January, 1897, if at all.

Wherefore defendant pleads and relies upon the Statute of Limitations of five years in such cases made and provided and that plaintiff's cause of action if any, for the taxes claimed herein and every part thereof is barred by limitation.

Paragraph 5. This defendant for further answer to the petition as amended alleges that at foreclosure sale in the United States Circuit Court for the District of Kentucky the said Edward H.
67 Harriman mentioned in the petition purchased all the property mentioned in the petition, including the railroad of the Chesapeake & Ohio Railroad Company, on the 25th day of July, 1896, which is the purchase thereof referred to by plaintiff in its petition, and that said Harriman continued the owner thereof until the 15th day of September, 1897, when by deed duly executed, acknowledged and recorded in office of Clerks of the counties through which the road runs in Kentucky he conveyed all the said property to the Chicago, St. Louis & New Orleans Railroad Company mentioned in the first paragraph of this answer, and that said Company has since been the owner therof. That the taxes claimed in the petition were not nor was any part thereof assessed, nor was any attempt or endeavor made by any officer of plaintiff to assess them at or any time before the purchase or conveyance made to the said Chicago, St. Louis & New Orleans Railroad Company on September 15, 1897.

Wherefore defendant pleads and relies upon the Statute of Limitations in such cases made and provided, and prays that plaintiff's action herein be dismissed and for all general relief.

J. H. HAZELRIGG,
PIRTLE & TRABUE,
J. M. DICKINSON,
For Defendant I. C. R. R. Co.

68 Franklin Circuit Court.

Sept. 24, 1904.

COMMONWEALTH OF KENTUCKY
vs.
CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO.

A Special Term of this Court is hereby ordered and called to commence on the 2nd Monday (14th day) of November 1904 at 9 o'clock A. M. for the purpose of hearing motions, orders, and judgments in this and 500 other causes.

Franklin Circuit Court.

April 11, 1905.

COMMONWEALTH OF KENTUCKY
vs.
C. & O. S. W. RY. CO., &C.

Ordered that this cause be set for the 16th day of this Court.

69 Franklin Circuit Court.

Apr. 14, 1905.

COMMONWEALTH OF KENTUCKY
VS.
C. & O. & S. W. RY. CO.

Ordered that this cause be set for the 19th day of this term.

Franklin Circuit Court.

Sept. 12, 1905.

COMMONWEALTH OF KENTUCKY
VS.
C. & O. & S. W. R. R. CO.

Ordered that the above styled cause be continued.

Franklin Circuit Court.

Sept. 13, 1905.

70 COMMONWEALTH OF KENTUCKY
vs.
C. & O. & S. W. R. R. Co.

Ordered that the order entered herein continuing this cause until the January term on yesterday be and the same is now set aside and this cause is assigned for trial on the 10th day of this Court.

Franklin Circuit Court.

Sept. 28, 1906.

COMMONWEALTH OF KENTUCKY
VS.
C. & O. & S. W. R. R. Co., &c.

A Special Term of this Court is hereby ordered and called to commence on the third Monday in October (15th day) 1906, at 9 o'clock A. M. and continue for six weeks for the purpose of hearing motions, orders and judgments in this and 400 other causes.

71 Franklin Circuit Court.

Oct. 15, 1906.

COMMONWEALTH OF KENTUCKY
VS.
C. & O. & S. W. RY. CO.

Ordered that the above styled cause be continued.

Franklin Circuit Court.

Filed Jan. 21, 1907.

COMMONWEALTH OF KENTUCKY, Plaintiff,
VS.
CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY and ILLINOIS CENTRAL RAILROAD COMPANY, Defendants.

This case having been heretofore transferred to equity and the proof by consent heard orally and submitted to the Court for judgment, and the court being now sufficiently advised, it is adjudged that the first paragraph of the plaintiff's petition as amended, be dismissed, to which the plaintiff excepts; on the second para-
72 graph of the plaintiff's petition as amended, it is adjudged that the plaintiff recover of the Illinois Central Railroad Company the sum of $10219.97 and the further sum of $1021.99 penalty upon same, and for its costs herein expended. To so much of the judgment as awards plaintiff a recovery of said sum, the Illinois Central Railroad Company objects, and its objection being overruled, it excepts, and prays an appeal to the Court of Appeals, which is granted; to so much of the judgment as dismisses the first paragraph of the plaintiff's petition, the Commonwealth excepts and prays an appeal to the Court of Appeals, which is granted.

Franklin Circuit Court.

Jan. 23, 1907.

COMMONWEALTH OF KENTUCKY
VS.
C., O. & SOUTHWESTERN RY. CO., &C.

Came the defendant Illinois Central Railroad Co. by attorney and filed its motion and grounds for a new trial herein.

73 Franklin Circuit Court.

Filed Jan. 23, 1907.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
CHESAPEAKE, OHIO & SOUTHWESTERN RY. CO., &c., Defendants.

Motion.

Comes the defendant, the Illinois Central Railroad Company and moves the Court for a new trial herein because the judgment of the Chancellor in holding this defendant liable for any of the taxes sued for is not sustained by the evidence and because the collection of the taxes for which judgment is rendered is barred by lapse of time.

TRABUE, DOOLAN & COX,
HAZELRIGG, CHENAULT &
HAZELRIGG,
Attorneys for I. C. R. R. Co.

74 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY, &c., Defendants.

Stenographer's Transcript of the Evidence.

75 Franklin Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY, &c., Defendants.

Bill of Evidence.

Be it remembered, that on the hearing of the above styled action, on Friday, October 6th, 1905, the parties introduced the following evidence:

The plaintiff offered in evidence all the exhibits, (A, B, C, D, E) filed with the petition, (a copy of which exhibits is filed herewith), and then rested.

Thereupon the defendants introduced the following witnesses in their behalf.

SAMUEL H. STONE, a witness for defendant, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. TRABUE, attorney for defendants:

Q. 1. State your name, age, occupation, and what was your occupation in the years 1895 and 1896?

76 A. My name is Samuel H. Stone; I now reside in Louisville, Ky.; I am fifty-five years of age; I may say I am a contractor by occupation now; I was Auditor of the State of Kentucky from January 1896 until January 1900.

Q. 2. State whether or not, during your term of office as Auditor, the question of the franchise taxation of railroad companies arose in the Board of Valuation and Assessment,——

(Plaintiff objects to the foregoing question.)

—and if so, what was done concerning the taxation of railroad companies' franchises in the state?

(To all of the foregoing question plaintiff objects.)

A. The question arose pretty soon after I became Auditor,—come before the Board in regard to the assessment of railroads for franchise taxation. There was considerable discussion and quite a number of arguments. The assessments of the railroads was entirely in the hands of the railroad commissioner, and——

(The plaintiff objects to any arguments before the board.)

—the Board labored a good deal in trying to make an equitable assessment of railroad property. In the year, the winter of 1898, we had never come to any conclusion with the roads, and after a good deal of argument and discussion of the matter, we made a tentative assessment against the railroads, and at the end of thirty days we sent out notice of final assessment, on a very much larger valuation than was afterwards fixed, after the railroads still contested and declined to pay it, and argued the question for another year. We were unwilling to force a conclusion, because we were not

77 sure of our ground, and in the winter of 1899, we had a general consultation with the roads of the state, and they agreed to pay us on a certain basis of valuation, if we would reopen the cases, and this we consented to do.

(Plaintiff objects to the foregoing answer, because this certainly is a matter of record, and if so, the record is the best evidence. If not a matter of record, plaintiff objects to witness testifying in regard thereto.) It is agreed that the witness shall testify, subject to exception by the plaintiff. We considered this subject, and reopened the matter, and reclassed the railroads, and they paid it. We did this for two reasons:—one was that we wanted,—we were somewhat doubtful,——

(Plaintiff objects to so much of the testimony as states that the railroads paid it; there being no plea of payment in the case at all.)

We did this for two reasons,—one, because we were somewhat doubtful of our rights in the case, and more especially to establish a precedent, get the railroads to acknowledge our rights,—our right to assess,—and to pay the assessment, and to thereby establish a precedent, by which they would hereafter be compelled to pay, or probably would be. In this assessment, the second assessment in 1899, we made, as I stated, a considerable reduction from the original assessment, and, in the matter of the Illinois Central Railroad Company, we agreed not to assess the C. & O. S. W. for the first two years, we agreed that,—in other words, that the amount we
78 assessed against the Illinois Central should be in full for all the properties they controlled for four years, this assessment, and the one sent out as final in 1898 we reconsidered and declined to assess any franchise tax against that road for one or two years, for the first years,—two years, I think. In other words, the agreement of the Board was to reconsider these assessments entirely, and take them back, in consideration of the fact that the road would pay the next two assessments on the basis agreed upon. When I went out of office, we considered that the entire railroad assessment of the State had been settled for those four years, and that we had passed on it amply, as best we could.

Q. 3. Please examine Exhibits "E" and "D," filed with the plaintiff's petition, and state whether or not any final notice was given under those, as indicating a final assessment, and which was intended by the Board as a final assessment for the amounts indicated on those jackets.

(Plaintiff objects to the foregoing question, but agrees that the witness may answer, subject to exception.)

A. Those are copies, I think,—yes, these are correct copies of the jackets in these matters, and shows that final notice was given February 21st, 1898, but, as I stated in answer to the other question, these were afterwards reconsidered and done away with in all cases, in every railroad in the state, not only this road, were afterwards reconsidered and taken back, not only because there were new ones, but because we did away with these assessments entirely.

Q. 4. Was the Board serious in claiming from these railroad companies, as a final assessment, these amounts which are indicated upon these jackets, or was that regarded by the Board as
79 tentative?

(Plaintiff objects to the foregoing question; objection sustained.)

Q. 5. Was that regarded by the Board as a final assessment of these companies,—these railroads,—for that amount of taxes, or only as tentative, and with the view of bringing the railroads before the Board?

(Plaintiff objects to the foregoing question on the ground that the witness can only speak for himself.)

The COURT: As a member of the Board, Col. Stone, you can only speak from your personal knowledge.

A. My personal knowledge is this: that the Board didn't expect——

(Plaintiff objects to the foregoing, and the court directs the witness only to state what his personal stand in the matter was.)

A. Well, there was no division in the Board on the matter at all. My personal stand was that these things were progressing rather slowly, that we should make this assessment and bring the railroads out, set them to discussing the matter, and come to an understanding. We—I did not expect any tax to be paid on this final assessment in 1898.

Q. 6. Now, I will ask this question,—if that matter was discussed in the Board, and if the position taken by the other members of the Board, with your personal knowledge, was, or was not, the same as yours?

(To the foregoing question the plaintiff objects.)

80 The COURT: Did your Board keep a record of your proceedings?

A. We did not.

The COURT: No record at all?

A. No, sir.

The COURT: That being the case, the Board having kept no record, each member of the Board would have to come and testify to what he himself did as a member of the Board.

Q. 7. Well, then, was the matter discussed in the Board, and if so, was or was not the position taken by the other members of the Board, within your personal knowledge, the same as yours?

(To which question the plaintiff objects, but agrees the witness may answer, subject to exception by plaintiff.)

A. Why, practically, the Board was unanimous in their actions in these matters. I couldn't say that was so every time the Board met, and on every subject, but the final action of the Board was unanimous.

Q. 8. Now, in 1898, was any final assessment concluded against any railroad in the state?

(Plaintiff objects to the foregoing question as irrelevant.)

The COURT: Col. Stone has answered that previously, in answering another question.

Q. 9. When was this matter finally taken up by the Board and the assessments against the railroads of the state completed?

A. (Plaintiff objects to the foregoing question unless the records are produced.)

Q. Sometime in the winter of 1899,—the records will show the exact date.

81 Q. 10. We have here a book from the office of the State Auditor, called "Records of Corporation Franchise Miscellaneous and Railroads," please examine that book, and state if you

can, and as nearly as you can, the date when the railroads of the state were finally assessed?

A. The final assessment, on which the taxes were paid, was made on February 17th in most cases, along during the months of Feb. and March.

Q. 11. What year?

A. 1899.

Q. 12. Were the taxes that you have stated were all paid, when you left the Auditor's office, paid upon the assessment of February or March 1899, to which you have just referred, or on some other?

A. Paid on the assessment made in the winter of 1899, in February or March.

Q. 13. Please state what, if any, assessments were made about that time against the Illinois Central Railroad Company, or any of the properties which they operated?

A. You want me to state the amounts? The Illinois Central Railroad Company paid franchise taxes on,—the report of September 15th, 1895, on $266438, amounting to $1132.36; on the report of September 15th 1896, paid on $411690, amounting to $2161.37; on the report of September 15th, 1897—These final assessments were made on March 1st 1899, and the taxes were paid March 27th 1899.

Q. 14. When were these taxes paid?

A. I have just stated,—March 27th 1899.

82 Q. 15. Do you know whether, exclusive of the Chesapeake and Ohio and Southwestern lines, any previous amount was ascertained for the lines operated by the Illinois Central Railroad Company for the years 1896 and 1897?

A. I don't think I understand. Please explain your question.

The COURT: Reform your question, Mr. Trabue.

Q. 16. Can you state whether in the early process of ascertaining,—of assessing the properties which were operated by the Illinois Central, exclusive of the Chesapeake and Ohio and Southwestern lines, other amounts, smaller than those indicated as finally settled, in the records you have just read, were arrived at?

A. I couldn't state now the exact amounts. I cannot remember the details.

Q. 17. I will ask you if, in the reports known as Report # 27, September 15th 1895, and Report # 34, September 15th 1896, there were not contained the faces or backs of jackets showing the capital of $1904000.00 for the year 1896 instead of $2114584, and for the year 1897 $2404500 instead of $2,272,380?

A. I have the original papers now in my hand, I think, that show these facts,—show the facts indicated in the question.

Q. 18. Do you remember what was the explanation of raising the amounts from $1,904,000 to $2,114,584, and from $2,272,380 to $2,404,500?

A. No, I don't believe I do, I don't remember.

Q. 19. Do you remember whether or not these raises were made at the time the proposition to assess the Chesapeake & Ohio & Southwestern was abandoned?

83 A. I don't remember.

Q. 20. What was the condition of the Chesapeake & Ohio Southwestern Railroad Company and its properties in the year 1895, and in the year 1896, when these reports mentioned in the petition were made?

(Plaintiff objects to the foregoing question, agreeing that the witness may answer subject to exception.)

A. All I know is from the reports and from the sworn statements made before the Board in regard to assessment of franchise taxes.

Q. 21. Do you know whether or not that railroad was in the hands of a receiver in either of those years?

A. Yes, sir, my recollection is that it was in 1895. It was in 1896 it was bought by Mr. Harriman, and operated by his agent, the Illinois Central Railroad Company.

Q. 22. Do you know whether the road was insolvent immediately prior to the purchase by Mr. Harriman.

(To the foregoing question and answers the plaintiff reserves exception.)

A. Yes, from some other information, obtained in some way, from statements made before the Board, it was insolvent, sold at public auction by the United States Court.

Q. 23. During what time were these representations made to the Board?

A. During the discussions of the subject by the Board with the representatives of the various railroads, I couldn't state exactly when it was, it was done——

84 Q. 24. Was that before or after March 1st 1899?

A. I rather think it was after the first of March, before 1899, after March 1st 1898, after we begun more seriously to take up the railroad question.

Q. 25. What time in the year are railroad franchises assessed by the Board of valuation?

(Plaintiff objects to the foregoing question, reserving exception to answer.)

A. Reports are made as of the 15th of September. We could not make the assessment until after the reports of the railroad commissioner upon which he values the tangible property,—that is necessary in ascertaining franchise tax, franchise properties are intangible, but the tangible——

Q. 26. What time is that done?

A. That assessment was made by the Board in December; came to us about New Year,—January 1st.

Q. 27. How long after receiving that does it take the Board of Valuation and Assessment to make its decision?

A. We generally went into it in the spring following, say, in February or March, I think it was done. As a matter of fact, we didn't establish any custom, because we only had the matter up in 1898 and 1899, never took hold of it until then.

Q. 28. Did you know, that after March 1899 there were any such

papers in the Auditor's office as those of which Exhibits E and D, filed with the petition, are copies?

85 A. No, I would not have laid any stress on it if I had known it. Those were simply memoranda.

Q. 29. When did you become Auditor?

A. January 1896.

Q. 30. Did you take up the question of assessment prior to that time by your predecessor?

A. Yes, sir, we discussed that considerably in the Board, through an af-idavit filed by him,—by Major Norman and Mr. Headley, two members of the Board, that the Board had considered all taxes against railroads for their term, and had concluded that the railroad commissioner had assessed enough to cover both tangible and intangible property——.

(To all of which plaintiff objects; objection sustained.)

Cross-examination.

By T. L. EDELEN, attorney for plaintiff:

X Q. 1. You have spoken of this assessment made in 1899. Was there any mention in that assessment of 1899 of anything except the Illinois Central Railroad?

A. I don't know whether there was mention made of it or not. As a matter of fact, it included all the properties operated by the Illinois Central.

X Q. 2. Is there any mention made in the record,—the record that you have testified from, giving your figures?

A. My recollection of the law is that any railroad operating a railroad,—and we took that ground,—that where one railroad was

86 operating another railroad, the operating company was the one to assess for all they operated.

X Q. 3. But, in that record from which you have testified, is there any mention made of anything except the Illinois Central?

A. Not on this record that I see. This record is just simply, as I understand it, the book record of the amounts assessed and paid on, and this was assessed and paid by the Illinois Central.

POLK LAFFOON, a witness for defendants, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. TRABUE, attorney for defendants:

Q. 1. Please refer to the book, "Reports of Corporation Franchises, Miscellaneous and Railroads," and state whether or not there appears on that book a final assessment of the franchise of any railroad company in the State of Kentucky for any year prior to 1899, and if so, what years?

A. The Mobile and Ohio was the only one,—that was made in 1898, that's the only one.

Q. 2. Please state whether or not that same assessment was not remade in the year 1899?

A. Yes, sir, an amended final notice was furnished in 1899.

Q. 3. Final notice of the same assessment to which you have referred, as made in 1898?

A. I don't know.

87 Q. 4. Is there anything by which you can ascertain?

A. No, sir, there is not. The Board kept no minutes of their proceedings.

Q. 5. Can you ascertain from the records whether the final notice given in 1899 was for the same years as those furnished in 1898?

A. The only thing that I can state from the record in my possession is, that the amended final notices, which were given in 1899, were given in lieu of the notices which were given in 1898, presumably upon the same report before the assessment.

Q. 6. This book to which you refer shows the assessment of franchises for all railroads in the state of Kentucky in the years 1896 and 1897?

A. Yes, sir, it does.

Q. 7. Does it show any assessment specifically for the railroad, the Cheasapeake & Ohio Southwestern, for these years or either of them?

A. It does not, because it was not the custom of the Board to put these assessments in this book until paid.

Q. 8. Were you in the Auditor's office in the year 1899?

A. No, sir, I was not.

Q. 9. Can you speak then of a custom in that office at that time?

A. I can only base my opinion upon the custom now, and the records I find there now that were made then.

Q. 10. Can you state from the records when an entry was made,—that is, whether it was made at the time of the assessment, or at the time of the payment,—referring to years previous to your

88 being in the office?

A. No, sir, I cannot.

Q. 11. Please file, as part of your testimony, copies of the jackets of the Mobile and Ohio assessment on the reports of September 15th 1895, and September 15th 1896, and September 15th 1897?

A. I herewith file these copies, marked #30, #32, and #25, for identification.

Cross-examination.

By T. L. EDELEN, attorney for plaintiff:

X Q. 1. Mr. Laffoon, in the assessment shown to have been made against the Illinois Central Railroad Company, testified to by Col. Stone, as of 1899, please state what the tangible property was, deducted from the total capital, in the year 1895?

(Defendant- objects to the foregoing question.)

In the final assessment, testified to by Col. Stone, as made in 1899, by the Illinois Central, please state what was the total tangible property deducted from the capital in order to reach the value of the franchise?

A. The total tangible property deducted from 1895, September 15th, was $1,848,146.

X Q. 2. Please state what was the tangible property for the same year of the Chicago, St. Louis and New Orleans Railroad Company, paid by the Illinois Central Railroad Company?

89 A. The Chicago, St. Louis and New Orleans was assessed in 1895 by the railroad commissioner at $1,848,146.

X Q. 3. Now, please state what was the tangible property deducted by the Illinois Central Railroad Company to reach the franchise as of September 15th 1896, made at the same time?

A. Probably wasn't deducted by the Illinois Central, but by the Board.

X Q. 4. What?

A. $1,860,690.

X Q. 5. For the same year, please state what was the tangible property assessed of the Chicago, St. Louis and New Orleans, operated by the Illinois Central Railroad Company?

A. $1,860,690.

X Q. 6. If I understand you, the deductions made in the assessments of 1899, testified to by Col. Stone, were derived from the assessments of the tangible property of the Chicago, St. Louis and New Orleans Railroad Company, and were identical in amount.

A. Yes, sir.

Redirect examination.

By Mr. TRABUE, attorney for defendants:

Q. 1. I will ask you to file copies of those papers found within C. & O. S. W. jackets, about which Col. Stone was questioned, covering reports September 15th, 1895, and September 15th, 1896?

90 A. I herewith file copies and mark them #7 and #6 for identification.

Recross-examination.

By T. L. EDELEN, attorney for plaintiff:

X Q. 1. Please state from the record what was the value of the tangible property of the Chesapeake & Ohio Southwestern Railroad Company, as assessed by the railroad commissioner for the two years 1895 and 1896?

A. The Chesapeake & Ohio Southwestern Railroad Company was assessed by the Railroad Commissioner for the year 1895, $4,566,396, and for the year 1896 at $4,701,389.

The foregoing was all the testimony introduced, or offered, or heard by the plaintiff and defendants on the hearing of the above action.

91 STATE OF KENTUCKY,
County of Franklin:

I, Elizabeth C. Rogers, official Stenographer of the Franklin Circuit Court, do certify that the foregoing fifteen pages are a true and correct copy of all the evidence introduced, or offered or heard by plaintiff and defendants on the trial of the above styled action, wherein the Commonwealth of Kentucky is plaintiff, and the Chesapeake, Ohio & Southwestern Railroad Company, &c., are defendants.

Given under my hand this 10th day of Oct. 1905.

ELIZABETH C. ROGERS,
Official Stenographer Franklin Circuit Court.

Examined and approved as the evidence heard by me, this 18th day of March 1907.

ROB'T L. STOUT,
Judge Franklin Circuit Court.

92 Franklin Circuit Court.

Feb. 2, 1907.

COMMONWEALTH OF KENTUCKY
vs.
C., O. & SOUTHWESTERN RY. CO., &C.

Came defendant, Illinois Central Railroad Company and filed schedule herein.

Franklin Circuit Court.

Filed Feb. 2, 1907.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
C., O. & SOUTHWESTERN RY. CO., &C., Defendants.

Schedule.

The Clerk of this Court will copy the entire record herein for the purpose of appeal.

TRABUE, DOOLAN & COX,
HAZELRIGG, CHENAULT & HAZELRIGG,
Att'ys for I. C. R. R. Co.

93 *Supersedeas Bond.*

THE COMMONWEALTH OF KENTUCKY:

Franklin Circuit Court.

ILLINOIS CENTRAL R. R. Co., Appellant,
against
COMMONWEALTH OF KENTUCKY, Appellee.

Upon an Appeal from a Judgment of the Franklin Circuit Court, Rendered 21st Day of January, 1907.

Whereas, Said Appellant Illinois Central Ry. Co. — an appeal from the judgment of the Franklin Circuit Court, rendered at its January Term, 1907, against it in favor of the appellee, for the sum of Ten thousand, two hundred and nineteen 97/100 dollars and one thousand and twenty one 99/100 Dollars and the Appellant desires to supersede the Collection of the said Judgment above mentioned.

Now, *we* Ed F. Trabue surety do hereby covenant to and with the appellee Commonwealth of Ky. that the Appellant will pay to the Appellee all costs and damages that may be adjudged against
94 the Appellant on the appeal, and also that *they* will satisfy and perform the entire Judgment above stated, in case it shall be affirmed, and any Judgment or Order which the Court or Appeals may render, or order*ed* to be rendered by the inferior Court, not exceeding in amount or value the aforesaid Judgment aforesaid. And also pay all rents, hire or damage, which, during the pendency of the appeal, may accrue on any part of the property of which the Appellee is kept out of possession by reason of the appeal.

Witness *our* hand*s*, this 14th day of March 1907.

ED F. TRABUE,
By DIKE HAZELRIGG, *Att'y.*

See power of attorney attached.

Attest:
BEN MARSHALL, *C. F. C. C.*

95 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY, &c., Defendants.

Know all men by these presents, that, whereas, the court aforesaid in the above entitled case on the — day of —— rendered judgment against the defendant, the Illinois Central Railroad Company, for the sum of —, and

Whereas, said Company desires to supersede the said judgment and I am willing to become surety of the said Company in the bond necessary to effect such supersedeas,

Now, therefore, I do hereby nominate, constitute and appoint James H. Hazelrigg and Dike Hazelrigg, or either of them, my true and lawful agent or agents, attorney or attorneys in fact for me and in my name to sign my name as surety upon supersedeas bond necessary and sufficient to supersede the said judgment; and I do hereby ratify and confirm the acts of my attorneys or attorney aforesaid in the premises.

Witness my signature this the 8th day of March, A. D. 1907.

EDMUND F. TRABUE

STATE OF KENTUCKY,
County of Jefferson, ss:

96 I, V. C. Yeager, Notary Public in and for the above county and State, do certify that this day the above instrument of writing was produced to me in my county by Edmund F. Trabue and was signed and acknowledged by the said Edmund F. Trabue to be his act and deed.

Given under my hand and seal of office this 8th day of March, 1907. My commission expires February 15, 1908.

[SEAL.] V. C. YEAGER,
(72) *Notary Public, Jefferson Co., Ky.*

MARCH 8, 1907.

COMMONWEALTH
v.
C., O. & S. W. R. R. Co., &c.

Hon. J. H. Hazelrigg, Attorney at Law, Frankfort, Ky.

DEAR SIR: I have real estate in Louisville worth between $18,000 and $20,000 and have other property so that I am worth more than double the amount of the judgment. In as much as the Railroad Co. is so amply solvent I assume, however, that no question will be raised on my sufficiency as a surety.

Yours very truly, EDMUND F. TRABUE.

T/Y.

97 Franklin Circuit Court.

ILLINOIS CENTRAL R. R. Co., Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Supersedeas.

I do certify that an appeal has been granted by the Franklin Circuit Court from a judgment rendered at its January term, 1907, in favor of Commonwealth of Kentucky, appellee, against Illinois Cen-

tral Railroad Company, appellant, for $11241.96 and that a supersedeas bond has been executed.

Therefore, the appellee and all others are commanded to stay proceedings on the judgment above recited.

Witness my hand as Clerk of said Court, this 14th day of March, 1907.

BEN MARSHALL, *C. F. C. C.*

(Endorsed:) Executed by delivering a true copy of the within supersedeas to N. B. Hays, Attorney General of Kentucky, this March 14th, 1907. R. C. Hieatt, S. F. C., by J. W. Suter, D. S.

98 STATE OF KENTUCKY,
County of Franklin, ss:

I, Ben Marshall, Clerk of the Franklin Circuit Court, do hereby certify that the foregoing 74 pages contain a true and complete copy of the record and papers in the case wherein The Commonwealth of Kentucky was plaintiff and the Chesapeake, Ohio & Southwestern Railroad Company, and Illinois Central Railroad Company were defendants, as appears from the records and files of the Franklin Circuit Court.

Witness my hand as Clerk of the Court aforesaid, this 14th day of March, 1907.

BEN MARSHALL,
Clerk Franklin Circuit Court.

Clerk's fee for transcript $26.90.

99 And with said transcript, there was filed a bill of evidence, and which is in words and figures as follows, to-wit:

100 Franklin Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
versus
CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY, &C., Defendants.

Bill of Evidence.

Be it remembered, that on the hearing of the above styled action, on Friday, October 6th, 1905, the parties introduced the following evidence:

The plaintiff offered in evidence all the exhibits (A, B, C, D, E) filed with the petition, (a copy of which exhibits is filed herewith), and then rested.

Thereupon the defendants introduced the following witnesses in their behalf.

SAMUEL H. STONE, a witness for defendant, having been first duly sworn, testifies as follows:

Direct examination.

101 By Mr. TRABUE, attorney for defendants:

Q. 1. State your name, age, occupation, and what was your occupation in the years 1895 and 1896?

A. My name is Samuel H. Stone; I now reside in Louisville, Kentucky; I am fifty-five years of age; I may say I am a contractor by occupation now; I was Auditor of the State of Kentucky from January 1896 until January 1900.

Q. 2. State whether or not, during your term of office as Auditor, the question of the franchise taxation of railroad companies arose in the Board of Valuation and Assessment,——

(Plaintiff objects to the foregoing question.)

—And if so, what was done concerning the taxation of railroad companies' franchise- in the state?

(To all of the foregoing question plaintiff objects.)

A. The question arose pretty soon after I became Auditor,—come before the Board in regard to the assessment of railroads for franchise taxation. There was considerable discussion and quite a number of arguments. The assessments of the railroads was entirely in the hands of the railroad commissioner, and——

(The plaintiff objects to any arguments before the board.)

102 —The board labored a good deal in trying to make an equitable assessment of railroad property. In the year, the winter of 1898, we had never come to any conclusion with the roads, and after a good deal of argument and discussion of the matter, we made a tentative assessment against the railroads, and at the end of thirty days we sent out notice of final assessment, on a very much larger valuation than was afterwards fixed, after the railroads still contested and declined to pay it, and argued the question for another year. We were unwilling to force a conclusion, because we were not sure of our ground, and in the winter of 1899, we had a general consultation with the roads of the state, and they agreed to pay us on a certain basis of valuation, if we would reopen the cases, and this we consented to do.

(Plaintiff objects to the foregoing answer, because this certainly is a matter of record, and if so, the record is the best evidence. If not a matter of record, plaintiff objects to witness testifying in regard thereto.)

(It — agreed that the witness shall testify, subject to exception by the plaintiff.)

We considered this subject, and re-opened the matter, and reclassed the railroads, and they paid it. We did this for two reasons—one was that we wanted,—we were somewhat doubtful,——

103 (Plaintiff objects to so much of the testimony as states that the railroads paid it; there being no plea of payment in the case at all.)

We did this for two reasons,—one, because we were somewhat doubtful of our rights in the case, and more especially to establish a precedent, get the railroads to acknowledge our rights,—our right to assess,—and to pay the assessment, and to thereby establish a precedent, by which they would hereafter be compelled to pay, or probably would be. In this assessment, the second assessment in 1899, we made, as I stated, a considerable reduction from the original assessment, and, in the matter of the Illinois Central Railroad Company, we agreed not to assess the C. & O. S. W. for the first two years, we agreed that,—in other words, that the amount we assessed against the Illinois Central should be in full for all the properties they controlled for four years, this assessment, and the one sent out as final in 1898 we reconsidered and declined to assess any franchise tax against that road for one or two years, for the first years,—two years, I think. In other words, the agreement of the Board was to reconsider these assessments entirely, and take them back, in consideration of the fact that the road would pay the next two assessments on the basis agreed upon. When I went out of the office, we considered that the entire railroad assessment of the State had been settled for those four years, and that we had passed on it amply, as best we could.

104 Q. 3. Please examine Exhibits "E" and "D," filed with the plaintiff's petition, and state whether or not any final notice was given under those, as indicating a final assessment, and which was intended by the Board as a final assessment for the amounts indicated on those jackets.

(Plaintiff objects to the foregoing question, but agrees that the witness may answer, subject to exception.)

A. Those are copies, I think,—yes, these are correct copies of the jackets in these matters, and shows that final notice was given February 21st, 1898, but, as I stated in answer to the other question, these were afterwards reconsidered and done away with in all cases, in every railroad in the state, not only this road, were afterwards reconsidered and taken back, not only because there were new ones, but because we did away with these assessments entirely.

Q. 4. Was the Board serious in claiming from these railroad companies, as a final assessment, these amounts which are indicated upon these jackets, or was that regarded by the Board as tentative?

(Plaintiff objects to the foregoing question; objection sustained.)

Q. 5. Was that regarded by the Board as a final assessment of these companies,—these railroads,—for that amount of taxes, or only as tentative, and with the view of bringing the railroads before the Board?

105 (Plaintiff objects to the foregoing question on the ground that the witness can only speak for himself.)

The COURT: As a member of the Board, Col. Stone, you can only speak from your personal knowledge.

A. My personal knowledge is this: that the Board didn't expect——

(Plaintiff objects to the foregoing, and the Court directs the witness only to state what his personal stand in the matter was.)

A. Well, there was no division in the Board on the matter at all. My personal stand was that these things were progressing rather slowly, that we should make this assessment and bring the railroads out, set them to discussing the matter, and come to an understanding. We—I did not expect any tax to be paid on this final assessment in 1898.

Q. 6. Now, I will ask this question,—if that matter was discussed in the Board, and if the position taken by the other members of the Board, with your personal knowledge, was, or was not, the same as yours?

(To the foregoing question the plaintiff objects.)

The COURT: Did your Board keep a record of your proceedings?

A. We did not.

The COURT: No record at all?

A. No, sir.

The COURT: That being the case, the Board having kept
106 no record, each member of the Board would have to come and testify to what he himself did as a member of the board.

Q. 7. Well, then, was the matter discussed in the Board, and if so, was or was not the position taken by the other members of the Board, within your personal knowledge, the same as yours?

(To which question the plaintiff objects, but agrees the witness may answer, subject to exception by plaintiff.)

A. Why, practically, the Board was unanimous in their actions in these matters. I couldn't say that was so every time the Board met, and on every subject, but the final action of the Board was unanimous.

Q. 8. Now, in 1898, was any final assessment concluded against any railroad in the state?

(Plaintiff objects to the foregong question as irrelevant.)

The COURT: Col. Stone has answered that previously, in answering another question.

Q. 9. When was this matter finally taken up by the Board and the assessments against the railroads of the state completed?

A. (Plaintiff objects to the foregoing question unless the records are produced.)

Q. Sometime in the winter of 1899,—the records will show the exact date.

Q. 10. We have here a book from the office of the State
107 Auditor, called "Records of Corporation Franchise Miscellaneous and Railroads," please examine that book, and state

if you can, as nearly as you can, the date when the railroads of the state were finally assessed?

A. The final assessment, on which the taxes were paid, was made on February 17th, in most cases, along during the months of February and March.

Q. 11. What year?

A. 1899.

Q. 12. Were the taxes that you have stated were all paid, when you left the Auditor's office, paid upon the assessment of February or March, 1899, to which you have just referred, or on some other?

A. Paid on the assessment made in the winter of 1899, in February or March.

Q. 13. Please state what, if any, assessments were made about that time against the Illinois Central Railroad Company, or any of the properties which they operated?

A. You want me to state the amounts? The Illinois Central Railroad Company paid franchise taxes on,—the report of September 15, 1895, on $266438, amounting to $1132.36; on the report of September 15th, 1896, paid on $411690, amounting to $2161.37; on the report of September 15th, 1897—These final assessments
108 were made on March 1st 1899, and the taxes were paid March 27th 1899.

Q. 14. When were these taxes paid?

A. I have just stated,—March 27th, 1899.

Q. 15. Do you know whether, exclusive of the Chesapeake and Ohio and Southwestern lines, any previous amount was ascertained for the lines operated by the Illinois Central Railroad Company for the years 1896 and 1897?

A. I don't think I understand. Please explain your question.

The COURT: Reform your question, Mr. Trabue.

Q. 16. Can you state whether in the early process of ascertaining,—of assessing the properties which were operated by the Illinois Central, exclusive of the Chesapeake and Ohio and Southwestern lines, other amounts, smaller than those indicated as finally settled, in the records you have just read, were arrived at?

A. I couldn't state now the exact amounts. I cannot remember the details.

Q. 17. I will ask you if, in the reports known as Report #27, September 15th 1895, and Report #34, September 15th 1896, there were not contained the faces or backs of jackets showing the capital of $1904000.00 for the year 1896 instead of $2114584, and for the year 1897 $2404500 instead of $2,272,380?

109 A. I have the original papers now in my hand, I think, that show these facts,—show the facts indicated in the question.

Q. 18. Do you remember what was the explanation of raising the amounts from $1,904,000 to $2,114,584, and from $2,272,380 to $2,404,500?

A. No, I don't believe I do, I don't remember.

Q. 19. Do you remember whether or not these raises were made at

the time the proposition to assess the Chesapeake & Ohio Southwestern was abandoned?

A. I don't remember.

Q. 20. What was the condition of the Chesapeake & Ohio Southwestern Railroad Company and its properties in the year 1895, and in the year 1896, when these reports mentioned in the petition were made?

(Plaintiff objects to the foregoing question, agreeing that the witness may answer subject to exception.)

A. All I know is from the reports and from the sworn statements made before the Board in regard to assessment of franchise taxes.

Q. 21. Do you know whether or not that railroad was in the hands of a receiver in either of those years?

A. Yes, sir, my recollection is that it was in 1895. It was in 1896 it was bought by Mr. Harriman, and operated by his agent, the Illinois Central Railroad Company.

Q. 22. Do you know whether the road was insolvent immediately prior to the purchase by Mr. Harriman.

110 (To the foregoing questions and answers the plaintiff reserves exception.)

A. Yes, from some other information, obtained in some way, from statements made before the Board, it was insolvent, sold at public auction by the United States Court.

Q. 23. During what time were these representations made to the Board?

A. During the discussions of the subject by the Board with the representatives of the various railroads. I couldn't state exactly when it was, it was done——

Q. 24. Was that before or after March 1st 1899?

A. I rather think it was after the first of March, before 1899, after March 1st 1898, after we begun more seriously to take up the railroad question.

Q. 25. What time in the year are railroad franchises assessed by the Board of Valuation?

(Plaintiff objects to the foregoing question, reserving exception to answer.)

A. Reports are made as of the 15th of September. We could not make the assessment until after the reports of the railroad commissioner upon which he values the tangible property,—that is necessary in ascertaining franchise tax, franchise properties are intangible, but the tangible——

Q. 26. What time is that done?

A. That assessment was made by the Board in December; came to us about new year,—January 1st.

111 Q. 27. How long after receiving that does it take the Board of Valuation and Assessment to make its decision?

A. We generally went into it in the spring following, say, in February or March, I think it was done. As a matter of fact, we

didn't establish any custom, because we only had the matter up in 1898 and 1899, never took hold of it until then.

Q. 28. Did you know, that after March 1899 there were any such papers in the Auditor's office as those of which Exhibits E and D, filed with the petition, are copies?

A. No, I would not have laid any stress on it if I had known it. Those were simply memoranda.

Q. 29. When did you become Auditor?

A. January 1896.

Q. 30. Did you take up the question of assessment prior to that time by your predecessor?

A. Yes, sir, we discussed that considerably in the Board, through an affidavit filed by him,—by Major Norman and Mr. Headley, two members of the Board, that the Board had considered all taxes against railroads for their term, and had concluded that the railroad commissioner had assessed enough to cover both tangible and intangible property——

(To all of which plaintiff objects; objection sustained.)

112 Cross-examination.

By T. L. EDELEN, attorney for plaintiff:

X Q. 1. You have spoken of this assessment made in 1899. Was there any mention in that assessment of 1899 of anything except the Illinois Central Railroad?

A. I don't know whether there was mention made of it or not. As a matter of fact, it included all the properties operated by the Ill. Central.

X Q. 2. Is there any mention made in the record,—the record that you have testified from, giving your figures?

A. My recollection of the law is that any railroad operating a railroad,—and we took that ground,—that where one railroad was operating another railroad, the operating company was the one to assess for all they operated.

X Q. 3. But, in that record from — you have testified, is there any mention made of anything except the Illinois Central?

A. Not on this record that I see. This record is just simply, as I understand it, the book record of the amounts assessed and paid on, and this was assessed and paid by the Illinois Central.

POLK LAFFOON, a witness for defendants, having been first duly sworn, testifies as follows:

113 Direct examination.

By Mr. TRABUE, attorney for defendants:

Q. 1. Please refer to the book, "Reports of Corporation Franchises, Miscellaneous and Railroads", and state whether or not there appears on that book a final assessment of the franchise of any railroad company in the State of Kentucky for any year prior to 1899, and if so, what years?

A. The Mobile and Ohio was the only one,—that was made in 1898, that's the only one.

Q. 2. Please state whether or not that same assessment was not remade in the year 1899?

A. Yes, sir, an amended final notice was furnished in 1899.

Q. 3. Final notice of the same assessment to which you have referred as made in 1898?

A. I don't know.

Q. 4. Is there anything by which you can ascertain?

A. No, sir, there is not. The Board kept no minutes of their proceedings.

Q. 5. Can you ascertain from the records whether the final notice given in 1899 was for the same years as those furnished in 1898?

A. The only thing that I can state from the record in my possession is, that the amended final notices, which were given in
114 1899, were given in lieu of the notices which were given in 1898, presumably upon the same report before the assessment.

Q. 6. This book to which you refer shows the assessment of franchises for all railroads in the State of Kentucky in the years 1896 and 1897?

A. Yes, sir, it does.

Q. 7. Does it show any assessment specifically for the railroad, the Chesapeake and Ohio Southwestern, for these years or either of them?

A. It does not, because it was not the custom of the Board to put these assessments in this book until paid.

Q. 8. Were you in the Auditor's office in the year 1899?

A. No, sir, I was not.

Q. 9. Can you speak then of a custom in that office at that time?

A. I can only base my opinion upon the custom now, and the records I find there now that were made then.

Q. 10. Can you state from the records when an entry was made,—that is, whether it was made at the time of the assessment, or at the time of the payment,—refer-ing to years previous to your being in the office?

A. No, sir, I cannot.

Q. 11. Please file, as a part of your testimony, copies of the jackets of the Mobile and Ohio assessment on the reports of September 15th 1895, and September 15th 1896, and September 15th 1897?

115 A. I herewith file these copies, marked #30, #32, and #25 for identification.

Cross-examination.

By T. L. EDELEN, attorney for plaintiff:

X Q. 1. Mr. Laffoon, in the assessment shown to have been made against the Illinois Central Railroad Company, testified to by Col. Stone, as of 1899, please state what the tangible property was, deducted from the total capital, in the year 1895?

(Defendant objects to the foregoing question.)

118

Form A8. Miscellaneous Corporations and Railroads.

Mobile and Ohio Railroad Co
Mobile Ala.

..... County.

REPORT FOR
September 15, 1895.
~~JUNE 30, 190~~

Capital	$			
Surplus				
Undivided Profits				
All other Assets				
TOTAL CAPITAL	$	750	950	
Less Tangible Property, &c		676	559	
FRANCHISE	$	74	391	
TAX	$		316	16

When Corporation was first notified Jan. 20th 1895
Final Notice Feby 21 1895
second final notice Oct. 6 1899
When County Clerk was notified 190
Tax paid Nov. 8 1899

REPORT No. 30

Filed with testimony of Polk Laffoon

Filed with testimony of Polk Laffoon Page 13

Mobile and Ohio Railroad Co.
Mobile, Ohio.

Report for Sept. 15 - 1895.

Capital.....$	.....
Surplus.....	.....
Undivided profits,....	.....
TOTAL CAPITAL.....$	1,676,827
Less Tangible property &c.....	676,559
FRANCHISE.....	1,000,268
TAX.....$	.....

1st Noted Jan. 20th 1895.

20

(Found in Jacket No. 30)

Form A8. 119 Miscellaneous Corporations and Railroads.

Mobile and Ohio Railroad Co.

Mobile, Ala.

..... County.

REPORT FOR
September 15— 1897
~~JUNE 30~~, ~~190~~

Capital	$	774	905
Surplus			
Undivided Profits			
All other Assets			
TOTAL CAPITAL	$	774	905
Less Tangible Property, &c		626	098
FRANCHISE	$	145	810
TAX	$		781 25

When Corporation was first notified Oct 6 1899
When corporation first notified ~~Sept 25~~ 1899

Final Notice January 19 190 0

When County Clerk was notified 190

Tax paid June 27th 190 0

REPORT No. 25

Filed with testimony of Polk Laffoon

Filed with testimony of Polk Laffoon Page 13.

Mobile and Ohio R R Co

Mobile and Ohio Railroad Co

Oct 2 1899

REPORT OF SEPTEMBER 15th, 1897.

Capital	$ ~~885 600~~
Surplus	774 905
Undivided profits,	
All other assets	
TOTAL CAPITAL	$ 885 600
Less Tangible property &c.	626 098
FRANCHISE	20 902
TAX,	1362.35

Changed

XXXXXXXX

Report for Sept. 15th 1897

Total value in Ky.

$885.600

Less tang

Report No. 25

First assessment Dec 22/95.

(Found in Jacket No. 25)

Form A8. 119 Miscellaneous Corporations and Railroads

Mobile and Ohio Railroad Co
Mobile Ala

Mileage 41

County.

REPORT FOR
September 15
~~JUNE 30, 190~~ 1896.

Capital	794	400	
Surplus			
Undivided Profits			
All other Assets			
TOTAL CAPITAL	794	400	
Less Tangible Property, &c	148	510	
FRANCHISE		771	25
TAX			

When Corporation was first notified Jany 20th ~~190~~ 1898
Final Notice Febg. 21 ~~190~~ 1898
Amended final notice Oct. 6th 1899
When County Clerk was notified ~~190~~
Tax paid Nov. 8th 1899

REPORT No. 32

Filed with testimony of Polk Laffoon.

Filed with testimony of Polk Laffoon, page 13.

Mobile & Ohio Railroad Co
Mobile, Ala

Report for
Sept. 15 1896.

Capital.....$	.....
Surplus.....	.....
Undivided profits.	.....
TOTAL CAPITAL,...$	1448760
Less tangible property &c ...	645590
FRANCHISES,.....	.....
TAX,.....$	.....

1st notice Jan. 20th 1898.

15.

Form A8. Miscellaneous Corporations and Railroads

Mobile and Ohio Railroad Co
Mobile Ala

County.

1899

REPORT FOR
September 15 1896
~~JUNE 30, 190~~

Changed to 2

Capital	953	473	50
Surplus	794	400	
Undivided Profits			
All other Assets			
TOTAL CAPITAL	953	473	50
Less Tangible Property, &c	645	590	00
FRANCHISE	307	883	50
TAX	1	616	38

When Corporation was first notified Jan. 20 ~~190~~ 1898
Final Notice Febg. 21 ~~190~~ 1898
When County Clerk was notified ~~190~~
Tax paid ~~190~~

REPORT No. 32

(Found in Jacket No. 32)

Form A8. Miscellaneous Corporations and Railroad

Chicago, St. Louis & New Orleans Railroad Co.

Chicago, Ill. County.

Filed with evidence of Polk Laffoon, Page 13

REPORT FOR
September 15th. 1895
~~JUNE 30, 190~~

Capital	$	1	914	000
Surplus				
Undivided Profits				
All other Assets				
TOTAL CAPITAL	$	1	914	000
Less Tangible Property, &c		1	848	146
FRANCHISE	$		65	854
TAX	$		279	11

When Corporation was first notified January 20th 1895 ~~190~~

Final Notice ~~190~~

When County Clerk was notified ~~190~~

Tax paid ~~190~~

Found in Jacket # 27

REPORT No. 7

Filed with Evidence of Polk Laffoon

Form A8. Miscellaneous Corporations and Railroads.

Chicago, St. Louis & New Orleans R.R

Filed with testimony of Polk Laffoon + Page 15.

..... County.

REPORT FOR
September 15. 1896
~~JUNE 30, 190~~

Capital	$	2	044	5.00
Surplus				
Undivided Profits				
All other Assets				
TOTAL CAPITAL	$	2	044	5.00
Less Tangible Property, &c.		1	760	690
FRANCHISE	$		283	310
TAX	$			963 00

Howard an Lackey #334

When Corporation was first notified 190

Final Notice 190

When County Clerk was notified 190

Tax paid 190

REPORT No. 6

Filed with testimony of Polk Laffoon

—. In the final assessment, testified to by Col. Stone, as made in 1899, by the Illinois Central, please state what was the total tangible property deducted from the capital in order to reach the value of the franchise?

A. The total tangible property deducted for 1895, September 15th, was $1,848,146.

X Q. 2. Please state what was the tangible property for the same year of the Chicago, St. Louis and New Orleans Railroad Company, paid by the Illinois Central Railroad Company?

116 A. The Chicago, St. Louis & New Orleans was assessed in 1895 by the railroad commissioner at $1,848,146.

X Q. 3. Now, please state what was the tangible property deducted by the Illinois Central Railroad Company to reach the franchise as of September 15th 1896, made at the same time?

A. Probably wasn't deducted by the Illinois Central, but by the Board.

X Q. 4. What?

A. $1,860,690.

X Q. 5. For the same year, please state what was the tangible property assessed of the Chicago, St. Louis & New Orleans, operated by the Illinois Central Railroad Company?

A. $1,860,690.

X Q. 6. If I understand you, the deductions made in the assessments of 1899, testified to by Col. Stone, were derived from the assessments of the tangible property of the Chicago, St. Louis & New Orleans Railroad Company, and were identical in amount?

A. Yes, sir.

Redirect examination.

By Mr. TRABUE, attorney for defendants:

Q. 1. I will ask you to file copies of those papers found within C. & O. S. W. jackets, about which Col. Stone was questioned, covering reports September 15th 1895 and September 15th 1896?

117 A. I herewith file copies and mark them #7 and #6 for identification.

Recross-examination.

By T. L. EDELEN, attorney for plaintiff:

X Q. 1. Please state for the record what was the value of the tangible property of the Chesapeake & Ohio Southwestern Railroad Company, as assessed by the railroad commissioner for the two years 1895 and 1896?

A. The Chesapeake and Ohio Southwestern Railroad Company was assessed by the railroad commissioner for the year 1895, $4,566,396, and for the year 1896 at $4,701,389.

The foregoing was all the testimony introduced, or offered, or heard by the plaintiff and defendants on the hearing of the above action.

(Here follow facsimiles of Report Jackets Nos. 30, 25, 32, 7, 6, marked pages 118, 119, 119½, 120, 121.)

122 STATE OF KENTUCKY,
County of Franklin:

I, Elizabeth C. Rogers, official stenographer of the Franklin Circuit Court, do certify that the foregoing fifteen pages are a true and correct copy of all the evidence introduced, or offered or heard by plaintiff and defendants on the trial of the above styled action, wherein the Commonwealth of Kentucky is plaintiff, and the Chesapeake & Ohio Southwestern Railroad Company, &c., are defendants.

Given under my hand this 10th day of October, 1905.

ELIZABETH C. ROGERS,
Official Stenographer, Franklin Circuit Court.

Examined and approved, as the evidence heard by me this 18th day of March, 1907.

ROBERT L. STOUT,
Judge, Franklin Circuit Court.

123 And with said transcript there was also filed a statement, and which is in words and figures as follows, to-wit:

Court of Appeals.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, & CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY, Appellees.

Statement.

The judgment appealed from was rendered on January 21st, 1907, and is found on page 71 of this record.

No summons is necessary.

E. F. TRABUE,
HAZELRIGG, CHENAULT & HAZELRIGG,
Attorneys for Appellant.

124 Be it remembered that on the 16th day of May, 1907, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered, to-wit:

I. C. R. R. Co.
v.
COMMONWEALTH, etc.

Franklin.

Came appellee by counsel and filed grounds, and moved the Court to strike from the record the Bill of Evidence, and exceptions, which motion is submitted, and appellee is given 30 days to file brief.

(The grounds mentioned in the foregoing order are in words and figures as follows, to-wit:

(Grounds missing from record.)

125 And afterwards on the 21st day of May, 1907, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered to-wit:

I. C. R. R. Co.
v.
COMMONWEALTH, etc.

Franklin.

The court being sufficiently advised, it is considered that appellee's motion to strike from the record the bill of evidence, and the bill of exceptions, be passed to the merits of the case.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 14th day of June, 1907, the following order was entered, to-wit:

I. C. R. R. Co.
v.
COMMONWEALTH, etc.

Franklin.

This case is ordered to be submitted.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 27th day of February, 1908, the following judgment was entered towit:

ILLINOIS CENTRAL R. R. Co., Appellant,
vs.
COMMONWEALTH OF KENTUCKY, etc., Appellees.

Appeal from the Franklin Circuit Court.

126 The Court being sufficiently advised, it seems to them, there is no error in the Judgment herein. It is therefore considered that said judgment be affirmed, which is ordered certified to said Court.

It is further considered that the appellees recover of the appellant their costs herein expended.

(And on said date the court delivered the following opinion.)

127 Court of Appeals of Kentucky, Feb. 27, 1908.

(To be reported.)

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH, Appellee.

From the Franklin Circuit Court.

Opinion of the Court by Judge Hobson.

This action was filed in the Franklin circuit court on December 5, 1902, by the Commonwealth of Kentucky to recover of the Chesapeake, Ohio & Southwestern Railroad and the Illinois Central Railroad the franchise tax of the Chesapeake, Ohio and Southwestern Railroad Company for the years 1896 and 1897 upon an assessment made on January 20, 1898, of which notice was given on that date and final notice was given on Feb. 21, 1898. The circuit court dismissed the petition as to the taxes for the year 1896 but gave judgment against the Illinois Central Railroad Company for the tax for the year 1897.

From this judgment the Illinois Central Railroad Company
128 appeals.

The report upon which the tax for the year 1896 was assessed was made on September 15, 1895, by John Echols as the general manager of the Chesapeake, Ohio and Southwestern Railroad Company. The report upon which the tax for the year 1897 was assessed was made by the Illinois Central Railroad Company, which had, in some way not explained in the record, come into possession of the railroad. The circuit court dismissed the petition of the Commonwealth as to the taxes for the year 1896 for the reason that it did not appear that the Illinois Central Railroad Company was then in possession of the railroad and the report for that year was made by the general manager of the Chesapeake, Ohio and Southwestern Railroad Company. It gave judgment against the Illinois Central Railroad Company for the taxes for the year 1897 because that company made the report upon which the assessment was based, and was then in possession of the railroad. In doing this the circuit court followed the opinion of this court in Southern Railway v. Coulter 113 Ky. 657, where the Illinois Central was held liable on this same assessment in a well considered opinion by this court. The court said:

"It is claimed on behalf of the appellant Illinois Central Railroad Company that, as it did not get possession of the entire lines
129 until some time in 1897, no franchise tax should be assessed against it prior thereto. The record, however, discloses the fact that it made reports to Auditor Stone, and upon these reports he fixed the value of its franchise, commencing with the year 1896, up to the same time the other assessments were made. We are therefore of the opinion that as they recognized themselves as owners

of the line at that time, and made their reports and paid taxes to the State, it is now too late to raise that question. We are not inclined to hold that appellants necessarily bound themselves to pay the county franchise tax simply because they paid the State a franchise tax. Neither have they any right to complain of the delay in enforcing the local taxes. They have simply had the use of the money without interest during these many years."

The defendant introduced on the trial Samuel H. Stone, who was the Auditor of the State in the year 1898, and, as such, a member of the board who made the assessment upon which the suit is based. He testified on the trial which took place in October 6, 1905 in substance that although the board made the assessment and sent out notice of it and at the end of thirty days sent out the final notice of assessment, they were unwilling to force a conclusion because they were not sure of their ground; and in the winter of 1899 they had a consultation with the railroads of the state and in this consultation in the year 1899 they agreed that the assessment then
130 made against the Illinois Central Railroad should be in full not only for that year but for the previous years. It also appears from the proof that the assessment which was made in 1899 was made in this way: The board took the total capitalization of the Chicago St. Louis and New Orleans Railroad and deducted from it the tangible property assessed against it and the balance was the sum on which the Illinois Central Railroad paid a franchise tax for the year 1899. But waiving this the testimony of the assessor who makes an assessment cannot be received after his term is out, to show that he did not consider his assessment a valid act or final. The board made the assessment in the way that all other assessments were made. It gave notice of the assessment to the railroad company as required by statute and at the end of thirty days it gave notice, as provided by the statute, that the assessment had become final. When this had been done, the matter passed beyond the control of the board. A final assessment had been had as provided by law, and if any injustice was done the taxpayer it was due entirely to his failure to appear before the board and ask a reduction of the assessment. No reliance could be placed in such proceedings if the validity of the record was made to depend upon the secret intentions of the assessing officer. The validity of their actions depends upon what they do and not upon their undisclosed
131 purposes. When the assessment had become final and the Railroad Company owed the state the amount of taxes thus fixed, the assessing officers were without authority afterward to make any agreement with the railroad to the effect that if the railroad would pay the taxes for 1899, they would forego collecting the taxes for the previous years. This precise question was also presented in the case of Southern Railway in Kentucky v. Coulter 113 Ky. 676. In disposing of it, we there said:

"Even if it be conceded that the old board agreed or stipulated with the appellants that they should not pay any franchise tax to the local authorities, still such agreement is null and void. It was held in City of Louisville v. Louisville R. Co. 111 Ky. 1, 23 R. 390

(63 S. W. 14) by this court, that the city council of Louisville could not release a street railway company from taxes due the city. Much less could the board of valuation and assessment release appellants from local taxation of the value of their franchise."

Much is said in the argument as to the hardship of the case, but we fail to see that appellant has any substantial grounds for complaint. It has escaped the payment of all franchise taxes for the year 1896 and has only been required to pay for one year instead of two; and as far as the amount of the assessment goes for
132 the year 1897, it is much less than it has been for the years succeeding 1899. The personal judgment against the Illinois Central Railroad Company was proper because it was in possession of the property and made the report upon which the assessment was made. The question most seriously insisted on is that the action was barred by limitation. The suit was brought within five years after the assessment was made but it was not brought within five years after the assessment might have been made by the board. The board should have made the assessment in the winter of the year 1897 and the action was not brought within five years from that time. Previous to the passage of the act of 1890 it was well settled that an action to recover taxes did not accrue until the taxes were assessed. (L. & N. R. R. Co. v. Com. 1 Bush 250, Covington v. Wilson, 5 R. 778, Louisville v. Johnson 95 Ky. 254) It is insisted, however, that this action is governed by the act of 1890 and that that act changes the rule.

The case of the Louisville Water Co. v. Commonwealth 89 Ky. 244 was decided on October 31, 1899. It was there held that in the absence of Legislative authority, taxes cannot be recovered by suit. The Legislature met soon after that opinion became final and proceeded promptly to pass the act of 1890 to change the rule then laid down. The purpose of the act was to give the Commonwealth a right to collect taxes by suit, in those cases where there was no
133 legislative authority for a suit to collect taxes. It authorized actions "to recover all taxes which may heretofore have accrued to the Commonwealth or which may hereafter accrue and which cannot be collected by the ordinary methods of distraint and sale * * * for the purpose of enforcing the state's lien on property which for any reason cannot be sold, or for the purpose of reaching intangible property which cannot otherwise be reached." The act then concludes with these words: "but no action shall be instituted or maintained under the provisions of this act upon any claim for taxes that have been assessed or might have been assessed more than five years before the commencement of the same."

It will be observed that the limitation provided by this act only applies to an action "instituted or maintained under the provisions of this act." If this action was not, and could not be, brought under the provisions of the act of 1890, then the limitation provided in that act does not apply here; for, by the express terms of the act, the limitation it prescribes only applies to actions instituted under the act.

At the time the act of 1890 was passed, the Commonwealth had no

adequate means of collecting its taxes from such corporations
134 as the Louisville Water Co., where the ordinary method of distraint and sale was not applicable. To remedy this defect, the act of 1890 was passed. In giving the Commonwealth a right of action which it did not previously have, the Legislature might annex to the grant such limitation as it saw fit; but this limitation would have no effect as to taxes which might be collected by suit under other legislation without regard to the act of 1890. At the time the act of 1890 was passed, there was no such thing in the state as a franchise tax. After the adoption of the present constitution in 1891, the Legislature by the act of 1893 provided for a franchise tax, and provided that the tax should be paid by the corporation into the Treasury and that if it was not so paid, an action might be maintained by the Commonwealth in the Franklin circuit court against the corporation to collect it. (Ky. Stat. 4171 Central Railroad Co. v. Com. 106 Ky. 329) This action was brought in the Franklin circuit court under section 4171 Ky. Stat. It could not have been maintained under the act of 1890 for that act did not confer jurisdiction upon the Franklin circuit court; and if the action had been brought under that act it must have been brought in the Jefferson circuit court, the county of the defendant's residence. As it could
135 not be brought under the act of 1890, the limitation prescribed by the act of 1890 is not applicable. When the Legislature provided a franchise tax it had the right to prescribe how this tax should be collected. This it did by Sec. 4171. When the legislature required the corporation to pay the money into the treasury, the cause of action by the state against the corporation did not accrue until the person was required to pay the money into the treasury and had failed to do so. When he failed to pay the money, his liability was a cause of action created by statute and by the express provision of the general law, an action might be maintained upon it within five years after the cause of action accrued. (Ky. Stat. 2515.) Where the Legislature created by statute a liability and in the statute provided no limitation, necessarily the limitation provided by the general law, in Sec. 2515 Ky. Stat. applies. This was so held in Louisville Ferry Co., v. Com. 108 Ky. 717. That was an action to collect the franchise tax for the year 1893, the assessment having been made on March 12, 1898. The counsel for appellant relied on the act of 1890 insisting that under it the action was barred by limitation as it was not begun in five years after the taxes might have been assessed. (See abstracts of briefs 108 Ky. 718-719.) In answer to this the court in its opinion called attention to its previous ruling in the case of Central Railroad Co. v. Commonwealth 106 Ky.
136 329 to the effect that actions to collect franchise taxes might be maintained in the Franklin circuit court; and expressly held that the action was not based on the act of 1890. The court said:

"The questions involved in this case are the same as in five other cases of the same appellant against the same appellee, this day decided (57 S. W. 624) except it is insisted that the statute of limitation bars a recovery. This court decided in Central Railway Bridge

Co. v. Com. 49 S. W. 456 that an action could be maintained under certain sections of the Kentucky Statutes, not necessary to mention, but it is sufficient to say the right to do so is not based on the act to which counsel refer" (108 Ky. 726).

"We have examined the revenue act, and are unable to find any provision therein limiting the time in which an action shall be brought to enforce a claim for taxes against the owner. Taxes are liabilities created by statute, and are barred after the lapse of five years after they are due and payable, and they do not become due until after the assessment is made. Sec. 2515 Ky. Stat. These taxes were not assessed until 1898, and of course, the statute does not bar a recovery" (108 Ky. 727).

The same question was involved in Southern Railroad in Ky. 113 Ky. 657. There franchise taxes from various corporations to
137 the counties of the state for the year 1896 and the subsequent years, were in question. As to a part of the taxes more than five years had elapsed since the taxes might have been assessed. The court held the corporations liable; the question of limitation is not mentioned in the opinion for the reason that the matter was deemed settled by the previous opinion. In the case of Louisville v. Com. 23 R. 598, which was an action brought under the act of 1890, and was not provided for by any other provision of the statute, the court applied the limitation of that act: thus showing that the court clearly had in mind that actions brought under the act of 1890 were governed by the limitation prescribed in that act. Counsel cite the cases of R. R. Co. v. Com. 24 R. 2124 and Com. v. Nute 24 R. 2138; but both of those cases were proceedings to assess omitted property under Sec. 4241 Ky. Stat. There is nothing in either opinion touching suits to collect taxes. The conclusion we have indicated is in accord with these cases. It was there held that under Section 4241 Ky. Stat. property might be retrospectively assessed within five days after the right to maintain the proceeding accrued. By the statute when the assessment is made under it, the taxes are to be collected as other taxes and so it necessarily follows that the state is not barred of collecting the taxes after five years from the time they might
138 have been assessed; but under these decisions she has five years to make the assessment and may then collect the taxes as other taxes are collected. To hold otherwise would be to hold that the state must make the assessment and sue for the taxes in five years, which would be inconsistent with all the cases on the subject.

Judgment affirmed.

Trabue, Doolan & Cox, Hazelrigg, Chenault & Hazelrigg, J. M. Dickinson, for appellant.

T. L. Edelen, C. J. Whittemore, R. B. Franklin, for appellee.

139 Be it remembered on the 28th day of March, 1908, the time *to* appellant to file a petition for rehearing, was extended to the 1st day of the April term, by Judge Barker.

And afterwards on the 11th day of April, 1908, the appellant by its counsel filed in the office of the Clerk of the Court of Appeals a petition for rehearing.

And afterwards on the 13th day of April, 1908, at a Court of Appeals, held at the Capitol at Frankfort, the following order was entered to-wit:

I. C. R. R. Co.
v.
COMMONWEALTH, ETC.

Franklin.

Came the appellant by counsel, and on motion the petition filed in the office of the Clerk of this Court in vacation, is now noted of record, and moved the Court to grant a rehearing, which motion is submitted.

(The petition mentioned in the foregoing order is in words and figures as follows, to-wit:

140 Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Franklin Circuit Court.

Petition for Rehearing.

1.

Finding, as we do, the decision herein made under misapprehension of basic facts, we should be uncandid if we forebore advising the court thereof. Refraining could only be upon the assumption that a rehearing would be denied us whether there were a foundation for the decision or not—a conclusion wholly inadmissible.

A personal judgment for taxes against appellant (Illinois Central R. R. Co.) upon a railroad operated by it as attorney in fact for Edward H. Harriman, is affirmed upon the assumption that appellant was in possession, the nature of which was unexplained, when the power of attorney filed by the Commonwealth itself as Exhibit A (Rec. 12), with its amended petition and appellant's answer, uncontradicted, show exactly the nature of appellant's possession of the railroad when it made the report Sept. 15, 1896, viz., as attorney in fact for said Harriman; something which did not appear in

141 Railway v. Coulter; and a judgment against appellant for taxes on Harriman's property on an assessment (if any) against the C., O. & S. W. R. R. Co. deprives appellant of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

The court was misled by what appeared, or rather what did not appear, in Railway v. Coulter, 113 Ky. 657. This misapprehension has led the court to affirm a personal judgment against an agent, or

attorney in fact, for taxes on its principal's railroad when the claim for a personal judgment had been put forth, and afterward withdrawn by the Commonwealth.

Likewise, this misapprehension has led the court to ignore the defense in paragraph 5 of appellant's answer, that any retrospective assessment against a subsequent purchaser is forbidden; Ky. Stats., Sec. 4021; and led the court to assume that an assessment had been made against appellant (Ill. Cent. R. R. Co.) when the assessment, if any, was against the C., O. & S. W. R. R. Co.

The result is that a personal judgment against the Illinois Central R. R. Co. is affirmed, based upon a supposed "assessment" against the C., O. & S. W. R. R. Co., when no record of any assessment ever existed, and when the jacket mema., claimed by the Common-
142 wealth to constitute an assessment, were made months after said Harriman sold and conveyed the property to the Chicago, St. L. & N. O. R. R. Co. (Rec. 48), and the Chairman of the Board accredited with making the assessment denied the charge, and disclaimed that the Board had ever any intention of making such assessment.

We shall prove our assertions by the record.

The power of attorney is of record, and shows for itself what it is (Rec. 12). Under it appellant operated as Harriman's attorney in fact. It can not, therefore, be said that its possession is unexplained. The court, however, in the opinion under reviews, says:

"The report upon which the tax for the year 1897 was assessed was made by the Illinois Central Railroad Company, which had, in some way not explained in the record, come into possession of the railroad."

This is the basis of the decision against appellant, and Judge Guffy's language in Railway v. Coulter, 113 Ky. 657, is quoted as authority therefor, as follows:

"It is claimed on behalf of the appellant, Illinois Central Railroad, that, as it did not get possession of the entire lines until some time in 1897, no franchise tax should be assessed against it prior
143 thereto. The record, however, discloses the fact that it made reports to Auditor Stone, and upon these reports he fixed the value of its franchise, commencing with the year 1896," etc. "We are therefore of the opinion that as they recognized themselves as owners," etc., etc.

Obviously the court was misled, as aforesaid, by what appeared, or rather did not appear, in Railway v. Coulter into the assumption that appellant's possession of the railroad Sept. 15, 1896, when it made the report, was unexplained. The contrary, however, is true, as its possession was explained by the power of attorney, and by the report itself which declares in its caption that it is the

"Report of the Chesapeake, Ohio & Southwestern R. R. Co. (operated by Illinois Central Railroad Company, Agent)." (Rec. 32.) Italics ours.

The report, as appears in this record, is in strict accord with the power of attorney aforesaid, because an "attorney in fact" is an

"agent." The apprehension under which this judgment was affirmed is two-fold, viz:

1. The surmise of an assessment against appellant (Ill. Cent. R. R. Co.) when the assessment (if any) was against the C.,
144 O. & S. W. R. R. Co.

2. The surmise that appellant's operation of the railroad was unexplained, when it was fully explained in this record, viz., both in the power of attorney (Exhibit A, Rec. 12) and in the caption of the report itself which is invoked by the Commonwealth.

That Railway v. Coulter is misapplied here is manifest from this language of the present opinion, to wit: "In doing this the Circuit Court followed the opinion of this court in Southern Railway v. Coulter, 113 Ky. 657, where the Illinois Central was held liable on this same assessment in a well considered opinion by this court."

If it be true that "the Illinois Central was held liable on this same assessment" in Railway v. Coulter, how many more times is it to be held liable upon that assessment? In Railway v. Coulter it was conceded that the State taxes had been paid upon the assessment upon which the Illinois Central was there held, and the question contested was as to the county taxes, and they were adjudicated according to the State assessment which had been paid. When, therefore, this court says that in Railway v. Coulter "the Illinois Central was held liable on this same assessment," it follows that the taxes so assessed have been paid. This consideration is deci-
145 sive against a judgment for further payment, or double taxation.

The fact is that the assessment under consideration in Railway v. Coulter was the final, total and only assessment ever made, and it was paid. Any other version of Railway v. Coulter is susceptible of a reductio ad absurdum, as just demonstrated.

a.

The Commonwealth never claimed an assessment against appellant (I. C. R. R. Co.), but simply claimed that appellant had made a report "in behalf of" C., O. & S. W. R. R. Co., (Rec. 3), and that the Auditor assessed "the franchise of the said Chesapeake, Ohio & Southwestern Railroad Company" (Rec. 4). There was, therefore, no assessment against appellant, nor any claim thereof; but the claim was of an assessment against the C., O. & S. W. R. R. Co. The jacket, the sole basis of the claim of an assessment, has not the name of appellant upon it. The Commonwealth, to show an assessment, filed the jackets as Exhibits B and C with its amended petition (Rec. 36), and the 1897 jacket shows "Chesapeake, Ohio & Southwestern Railroad Company," and not I. C. R. R. Co. There is not even a pretense, therefore, of an assessment against appellant, I. C. R. R. Co., and, consequently, there is no foundation
146 for any judgment against appellant even upon the assumption now proceeded on, viz., an unexplained possession and operation of the railroad.

The case decided, therefore, really never existed. The court must have thought that there had been an assessment upon the jackets

against appellant, I. C. R. R. Co., and that judgment had been rendered by the Circuit Court upon such assessment; but this, as aforesaid, was a misapprehension. Had the Board made an assessment against appellant, I. C. R. R. Co., upon the assumption that it was in an unexplained possession of the railroad, the case which this court has assumed to decide would then have been presented. We have here, however, a personal judgment against appellant without any assessment to base it upon.

An Action is not maintainable against the Illinois Central Railroad Co. upon an assessment (if any) against C., O. & S. W. R. R. Co. The Commonwealth understood this, and as the basis of its claim for personal judgment alleged (Rec. 3) that appellant, "as a partial consideration for" the railroad, "covenanted to pay the Commonwealth all taxes accrued or accruing for which the said Chesapeake, Ohio & Southwestern Railroad Company was or was to be liable." (Italics ours.) Finding this untrue, the Commonwealth withdrew this allegation, and amended its petition,
147 claiming only an enforcement of a lien for the taxes claimed (Rec. 9). Accordingly, it says (Rec. 10): "The plaintiff now prays that said allegations may be stricken from the original petition, and in lieu thereof it now asserts."

In lieu of the stricken allegation, it avers the purchase by Harriman, and propounds the paper of August 19, 1896, as Exhibit A with its pleading. Exhibit A is merely a power of attorney to appellant to operate the road as attorney in fact for said Harriman (Rec. 12); and was no conveyance, as erroneously assumed in the amended petition (but denied in the answer, Rec. 46). The nature of the title to the C., O. & S. W. Railroad was averred by appellant (Rec. 48, par. 5), viz., that said Harriman purchased the property July 25, 1896, and continued its owner until September 15, 1897, when by deed, recorded in every county on the line, he conveyed it to the Chicago, St. Louis & New Orleans R. R. Co., which had ever thereafter been owner, and that there was no attempt at assessment before the purchase by the present owner, C., St. L. & N. O. R. R. Co., Sept. 15, 1897; and appellant pleaded a defect of parties, to wit, of the owner, C., St. L. & N. O. R. R. Co. (Rec. 46).

148 *b.*

The report was not made by appellant in its own name, but as follows:

"Report of the Chesapeake, Ohio & Southwestern R. R. Co. (operated by Illinois Central Railroad Company, Agent)." (Rec. 32.) Italics ours.

That appellant, I. C. R. R. Co., was "agent" also appears in the body of the report (Rec. 33), as follows: "Name, J. C. Welling. Position, Vice-President I. C. R. R. Co., Agt."

The report was not made for assessment purposes, for no assessment under Section 4077 (nor any assessment of franchise or tangible —, except by the Railroad Commission, under Section 4096), had ever been made of a railroad franchise in Kentucky.

It is thus demonstrated, first, that the report was not made for assessment purposes; secondly, an assessment of any railroad by the Board of Valuation and Assessment was unheard of until a year or so afterward; thirdly, there was never any record of any assessment until March, 1899, when an assessment was entered against the Chicago, St. Louis & N. O. R. R. Co., which purchased from Harriman Sept. 15, 1897, and then leased to the Illinois Central Rail-
149 road Company; fourthly, the mem. endorsed upon the jacket, now treated as the basis of an assessment, referred solely to the C., O. & S. W. Railroad Co., and not to the Illinois Central Railroad Co., so that if an assessment at all it was an assessment of the C., O. & S. W. R. R. Co.; fifthly, the Commonwealth in its petition and amendment claimed it to be an assessment of the C., O. & S. W. R. R. Co., and not of the Illinois Central Railroad Co., attempting to hold the Illinois Central Railroad Co. upon the assumption of a promise to pay the taxes assessed against the C., O. & S. W. R. R. Co., a claim afterward withdrawn as aforesaid; sixthly, the Commonwealth having withdrawn the claim of personal judgment, claimed at the time of judgment only a lien upon the railroad of the Chicago, St. L. & N. O. Railroad Co. (which company was not brought before the court, notwithstanding a plea of defect of parties); seventhly, the supposed assessment, had it existed, would have been retrospective, and forbidden as to a subsequent purchaser (Sec. 4021); eight-ly, the Auditor swore that the jacket endorsements were private mem-randa, and never intended as an assessment; ninthly, the jacket endorsements did not in any sense con-
stitute a record, they were signed by nobody, but were simply
150 memoranda upon the back of an envelope intended to hold other papers, and had never been treated as a record; and, moreover, there were two jackets for each year which were contradictory, and no record to explain that one controlled the other (Laffoon, Q. 1, p. 68); tenthly, there was actually a record of all taxes assessed against the Chicago, St. L. & N. O. R. R. Co. (owner of road formerly C., O. & S. W. R. R.) in March, 1899, actually recorded in the Corporation Tax Book; eleventhly, no railroad in Kentucky ever paid a franchise tax prior to March, 1899, nor a tax assessed prior to March, 1899, nor any such taxes except those entered in the same Corporation Tax Book.

II.

The judgment just affirmed violates the Fourteenth Amendment.

The personal judgment against appellant violates the Fourteenth Amendment to the United States Constitution in two particulars, to-wit: First, it denies appellant the equal protection of the laws; secondly, it denies appellant due process.

a. Appellant is denied the equal protection, as herein else-
151 where explained, in being required to pay money upon the assumption that it had been assessed, when the acts relied upon as an assessment were simply memoranda upon the jackets which were made by the Board regarding every railroad company in Kentucky January 20 and February 21, 1898, and abandoned by the

Board as to every railroad company in Kentucky, and nevertheless judgment is now rendered against appellant upon the assumption that such memoranda constituted an assessment of taxes which appellant is adjudged liable to pay. No clearer case of the denial of the equal protection of the laws is conceivable. The chairman of the Board has proved not only that the memoranda were not intended as assessments, but that they were not enforced as assessments against any railroad in Kentucky, and nevertheless the judgment now complained of enforced those memoranda as an assessment of money which appellant is adjudged liable to pay.

When it is proved that the jacket memoranda were not only not intended as assessments, but were not enforced as such against any other railroad in the State, it results that a judgment against appellant for taxes based upon such memoranda actually taxes appellant on a different basis, and by a different method, from other railroads in Kentucky, and thereby denies appellant the equal protection of the laws.

152 In Raymond v. Chicago, U. T. Co., 28 Sup. Ct. Rep. 7, 12 (1908), the traction company was held to be denied the equal protection of the laws, and denied due process where the method adopted for assessing it actually resulted in imposing upon its property a different burden from that imposed on other property. The case was distinguished from Coulter v. Louisville & N. R. Co., 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342. The court said (page 12):

"The case before us is one which the facts make exceptional. It is made entirely clear that the Board of Equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year. * * * There is here no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the State, which the State might do (Coulter v. Louisville & N. R. Co., 196 U. S. 599, 49 L. Ed. 615, 25 Sup. Ct. Rep.

153 342), but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations."

Other cases recognizing this principle are: The Railroad Tax Cases, 13 Fed. Rep. 722, 733, 734, and 735 (1882); County of Santa Clara v. Southern Pac. R. R. Co., 18 Fed. 385, 399 (1883); Railroad and Telephone Cos. v. Board of Equalizers, 85 Fed. 302, 317 (1897); Louisville Trust Co. v. Stone, 107 Fed. 305 (C. C. A. 1901).

b. A point equally as inimical to the Fourteenth Amendment is that appellant is adjudged liable to pay a large sum of money as taxes without an assessment against appellant, when as assessment is indispensable to liability for taxes.

Cooley says, Vol. 1, Taxation, p. 597:

"An assessment, when taxes are to be levied upon a valua-
154 tion, is obviously indispensable. It is required as the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities. The assessment is, therefore, the most important of all the proceedings in taxation, and the provisions to insure its accomplishing its office are commonly very full and particular."

Citing People v. Weaver, 100 U. S. 539, 545; Slaughter v. Louisville, 89 Ky. 112; State v. Cheraw, etc., R. Co., 54 S. C. 564, 32 S. E. Rep. 691 (1899), etc.

Judge Cooley's text is the basis of this court's decision in Covington v. Carroll, 108 S. W. Rep. 295, 296, a case conclusive on this point.

The State can not maintain an action against an owner for taxes until a valid assessment has been made against the property (Clegg v. State, 42 Tex. 610).

"An assessment is, in the broadest sense, a jurisdictional requirement." Roberts v. First National Bank, 8 N. D. 504.

"This defect of jurisdiction can not be remedied by curative statute." McReynolds v. Longenberger, 57 Pa. St. 13.

155 "All proceedings on a void assessment are void." Flanagan v. Dunne, 105 Fed. R. 828.

In Slaughter v. City, 89 Ky. Rep. 112, 123, this court, in passing upon the effect of curative statutes upon void assessments, said:

"The basis of the right to collect taxes from him consists in the valuation of his property; and to deny him the right to be heard in making this valuation, would be the taking of his property without due process of law. The valuation is the due process of law by which the right to take property for taxes is begun, etc."

In Powers v. Fuller, 30 Iowa 476, 477, the court said:

"We have already held that the assessment of real estate is one of the essential prerequisites to the exercise of the taxing power, and without which the right to sell could not arise; and hence that it was not competent for the legislature to make the deed conclusive evidence of that fact. McCready v. Sexton, 29 Iowa 356; 4 West. Jur. 284."

156 In State v. Cheraw & D. R. Co., 54 S. C. 564, 32 S. E. Rep. 691, it was held that an assessment was indispensable to liability for tax and must precede an action to recover the tax, and that no statute could legally provide for such recovery without assessment. In an elaborate discussion of the vital questions involved, the court cited People v. Weaver, 100 U. S. 539, and other authorities, and from the former quoted as follows (695):

"Then the court proceeds to quote the following: 'When taxes have been properly decided upon, an assessment may become an indispensable proceeding in the establishment of any individual charge against either person or property. This is always requisite when the taxes are to be levied in proportion to an estimate either of values or benefits, or the results of business.' 'An "assessment," strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual

subjects of taxation within the district. As the word is more commonly employed, an "assessment" consists in the two processes—listing the persons, property, etc., to be taxed; and of esti-
157 mating the sums which are to be the guide in an apportionment of the tax between them. * * * Taxation by valuation can not be apportioned without it.' Cooley Taxation, 258, 259; Bur. Taxation, p. 198, Sec. 94."

The appellant has also been denied due process of law in that the judgment of the court takes its property to pay taxes of the owner, the only relation between them being that the appellant operated the railroad of the C., O. & S. W. R. R. Co. as agent for the then owner of the property. The record shows that the I. C. R. R. Co. was not the owner of the property during the year for which the taxes are assessed. The proposition that one man's money can be taken to pay another man's debt, and that to compel it is to deprive a person of his property without due process of law, is so plain that it is difficult to elaborate it. To whatever penalties a railroad company may be subjected by operating a foreign railroad for the benefit of its then owners, personal liability for the owner's taxes is not one of them. It is almost impossible to find direct authority for so obvious a proposition. The court may be referred, however, to Hovey v. Elliott, 167 U. S. 409 (1897), holding that a person can not have a decree entered pro confesso against him because he is in
158 contempt of court.

The loose jacket memoranda, attested by no one, bearing no signature, simply endorsed upon envelopes, have no semblance of a record. If they were records, then the similar jacket endorsements thrust inside the Chicago, St. L. & N. O. jackets were "records," for both were exactly alike, and indicated different amounts. We should have, therefore, in the case of that company two inconsistent records, to-wit, two jackets for each year bearing endorsements of different franchise values. Which, then, is the record? Is the jacket endorsement thrust inside the envelope the record, or is the jacket or envelope enclosing it the record? Presumably that preserved inside is the record, but the endorsement upon the envelope, or jacket, inclosing it corresponds to the entries upon the tax book, they indicate larger sums of money, and they have been accepted by the Board, taxes have been paid thereon, and they have been treated in Railway v. Coulter as the real franchise assessment. Accordingly, we submit that the assumption that loose jacket memoranda constitute records of assessment makes a dangerous departure from safe moorings, and that Auditor Stone is not liable to censure in disputing their sanctity as records.

In view of such a situation, is it not alarming to contemplate that a person protected by constitutions and laws could be called upon to pay $10,000 or $15,000 to the State, and as much or more to the counties and municipalities (considering the mileage and
159 rates), when there is nothing to base the liability except loose endorsements upon jackets declared by the man who made them to have been intended as no evidence of any liability whatsoever of anybody? If liability can be so predicated there is no longer

any safety to property. There can be no assessment without a record (Cooley, Tax. Chap. XI., p. 576).

Citation of authorities, however, seems almost superfluous because in the case at bar the principle is recognized in the decision that limitation only began to run from the assessment, thus proving assessment an indispensable element of liability.

Assessment is essentially and necessarily indispensable because it is simply the apportionment among individuals, or among properties, of the total sum to be raised by taxation. Without assessment, therefore, no sum for payment by any person is indicated, and, of course, a judgment for a sum imposed by sovereign power, but never previously indicated, can not constitute due process. There was no assessment against appellant, I. C. R. R. Co., as is above shown, the jacket memoranda referring solely to the C., O. & S. W. R. R. Co., and not to appellant.

160 An assessment is indispensable to a tax, and a record to an assessment. Due process of law requires a record. The appellant's rights can not be made to turn upon whether or not an old envelope or jacket happened to be destroyed. This case illustrates the absolute necessity of the rule that there can be no assessment without a record. The jackets of all the other railroads in Kentucky were destroyed. The jacket of the C., O. & S. W. R. R. Co. was found. Therefore, the present owner of the railroad mentioned on the found envelope is required to pay a heavy sum, while the owners of railroads named on lost envelopes or jackets escape taxation on a similar basis and enjoy the benefit of the assessments which form the basis of the decision in Railway Co. v. Coulter.

We especially ask this court to pass upon these claims of protection under Federal Constitution.

Accordingly, we submit that aside from the question of limitation there can be no foundation for the judgment which has just been affirmed, and, as we submit, clearly under a misapprehension of fact.

III.

161 The basis invoked to sustain the supposed assessment in question would hold every railroad in Kentucky for franchise taxes many times as great as were assessed against them by the Board in March, 1899, and paid by the other railroad companies when the taxes paid to the State by appellant (for its lessor, Chicago, St. L. & N. O. R. R. Co.) in March, 1899, were paid, because Auditor Stone swears, and Polk Laffoon with his records proves, that all the railroads in Kentucky were at first charged on the jackets with the immense sums analogous to those indicated on the C., O. & S. W. jackets containing the reports of Sept. 15, 1895, and Sept. 15, 1896 (Rec. 15, 36; Rec. 56, 65).

The Board had assessed no railroad in Kentucky, nor concluded upon any assessment in 1898; they did not make a single assessment upon any railroad franchise until March, 1899. Auditor Stone says (p. 58):

"Those are copies, I think,—yes, these are correct copies of the jackets in these matters, and shows that final notice was given Feb-

ruary 21, 1898, but, as I stated in answer to the other questions, these were afterwards reconsidered and done away with in all cases, in every railroad in the State, not only this road, were afterwards reconsidered and taken back, not only because there were new ones,
162 but because we did away with these assessments entirely.

"Q. 9 (p. 60). When was this matter taken up by the Board and the assessments against the railroads of the State completed?

"A. Sometime in the winter of 1899,—the records will show the exact date."

After examining the Corporation Tax Book, he says (A. 10):

"The final assessment, on which the taxes were paid, was made on February 17th in most cases, along during the months of February and March.

"Q. 11. What year? A. 1899." (P. 60.)

Polk Laffoon, Rec. 65, proves that the Corporation Tax Book showed no assessment prior to 1899, and that it shows in 1899 assessments of the franchises "for all railroads in the State of Kentucky in the years 1896 and 1897." (Q. 6, p. 65.)

Notwithstanding, therefore, no railroad in Kentucky would ever pay any franchise taxes except those entered in March, 1899, in the Corporation Tax Book—the only record ever kept of franchise taxes—a judgment is now rendered against appellant for taxes
163 which the Chairman of the Board declares were never intended to be assessed; appellant being thus denied that equal protection of the laws which has been accorded to all other railroad companies in Kentucky.

Worse still, no franchise tax assessment against any railroad in Kentucky was made in 1896, nor yet in 1897; and when the Board proposed in 1898 to make franchise assessments, and in 1899 did make such assessments for the years 1896 and 1897, the Chicago, St. L. & N. O. R. R. Co. was, and since September 15, 1897 had been, owner of the railroad which it had, on same day, leased to appellant, I. C. R. R. Co. Appellant was, therefore, of course liable for no taxes upon that road. When, therefore, appellant (lessee) negotiated on behalf of the Chicago, St. L. & N. O. R. R. Co. (lessor) with the Board in 1899 the discussion concerned, and could only concern, the question of lien on the bankrupt properties bought by Harriman in July, 1896, and sold to the Chicago, St. L. & N. O. R. R. Co. September 15, 1897, except for the years 1898 and 1899 accruing after the purchase by the Chicago, St. L. & N. O. R. R. Co., and except as to the Cairo line. There was no personal assessment of C., O. & S. W. taxes against the Chicago, St. L. & N. O. R. R. Co. (lessor) for back taxes for 1896 and 1897 ever contemplated,
164 nor any personal assessment against appellant, Illinois Central R. R. Co. (lessee), at all (Rec. 65).

The situation, then, was that when in 1898 the Board first conceived the idea of railroad franchise assessments appellant, as lessee, had been since September 15, 1897, operating the railroads of the Chicago, St. L. & N. O. R. R. Co., purchased September 15, 1897, covering a lot of bankrupt companies, including C., O. & S. W.

Railroad, Ohio Valley Railroad, etc. No railroad in Kentucky had ever paid or been assessed a franchise tax in addition to that assessed by the Railroad Commission, and the Chicago, St. L. & N. O. did not regard itself liable for a further franchise tax, and a fortiori, liable for a franchise tax of any of the bankrupt concerns whose properties it had lately bought and then owned. Not only did a bankrupt concern have no franchise value, but Sec. 4021 forbade retrospective assessment against a purchaser. Consequently, what the Board did was to raise the proposed franchise assessment against the Chicago, St. L. & N. O. R. R. Co. from $1,914,000 to $2,114,584 for 1896, and from $2,272,380 to $2,404,500 (or from $2,044,500 to $2,272,380) for 1897 (Stone, Rec. 61, Q.'s 17, 18).

Whether the Board abandoned all assessment proceedings as to the bankrupt concerns, and in consideration thereof raised the
165 Chicago, St. L. & N. O. assessment or made a lump assessment in the name of the Chicago, St. L. & N. O. covering all its lines owned at the time (including, of course, C., O. & S. W. line), is not clear from the testimony of Stone. It is clear, however, that this Board made no assessment of any railroad in Kentucky until March, 1899, and that it then assessed all the railroads and recorded the assessment in the Corporation Tax Book. The final assessment, so recorded, could not have been an assessment if the (unsigned) jacket memoranda of January 20 and February 21, 1898, had constituted an assessment, for there could not be two assessments for the same years on the same property.

Moreover, the testimony of Stone and Laffoon shows, as aforesaid, that the jacket memoranda of January 20 and February 21, 1898, suggested $1,914,000 as the stock value for 1896 and $2,044,500 as the stock value for 1897 of the Chicago, St. L. & N. O. R. R. Co., but that the final assessment in March, 1899, of that company for those years, entered in Corporation Tax Book, was $2,114,584.00 (instead of $1,914,000 for 1896 and $272,380.00 instead of $2,044,500.00 for 1897); and the record in Railway v. Coulter shows that the increased sums were treated by this court as the real assessment. This action of the court disproves the contention that the jacket memoranda of January and February, 1898, were
166 records of an assessment, for had they been records of an assessment they would have constituted an assessment and the Board could not have raised the assessment fifteen months afterward. It is, therefore, demonstrated that the Corporation Tax Book, and not the loose, unsigned jacket memoranda, constituted the records of taxes, as sworn to by Stone, and as is uncontradicted.

In combating the attempt to again tax appellant (or its lessor) in this case appellant is but claiming the equal protection of the laws accorded to all other railroad companies in Kentucky.

We submit, therefore, that grave injustice is done not only to appellant, but to the Board, when the court says:

"No reliance could be placed in such proceedings if the validity of the record was made to depend upon the secret intentions of the assessing officer,"

and denies Auditor Stone's right

"afterward to make any agreement with the railroad company to the effect that if the railroad would pay the taxes for 1899 they would forego collecting the taxes for the previous years."

167 Instead of such a situation we find, first, that Stone was impeaching the record, but speaking by the only record, the Corporation Tax Book, and that the Tax Book and the jacket memoranda were not, and could not both be "the record;" secondly, that there was no record of any franchise tax against any railroad in Kentucky until 1899, for this court in 1902 adjudicated the 1899 assessment to be the real assessment, and ordered it certified to the counties accordingly; and that instead of an agreement by the Board to forego all taxes "for the previous years" if appellant "would pay the taxes for 1899" the taxes for 1896, 1897, 1898 and 1899 were actually assessed, and paid.

As the entire assessment, made in 1899, covered franchise taxes for the years 1896, 1897, 1898, and 1899, both appellant and the Board are done great injustice by the statement in the opinion that appellant "has escaped the payment of all franchise taxes for the year 1896, and has only been required to pay for one year instead of two; and as far as the amount of the assessment goes for the year 1897, it is much less than it has been for the succeeding years."

This declaration is difficult to understand, for appellant is said, in the opinion, to be liable for 1897 taxes because it was in
168 possession unexplained, and made a report, but it was not in possession and made no report on the previous year. Why, then, is it to be congratulated for escaping 1896 taxes? Evidently, this was said under a misapprehension.

Again, why should not an assessment for 1897 be less than the 1899 assessment, when we reflect that the bankrupt sale was less than sixty days before the report of September 15, 1896, and the 1899 assessment was some time after the railroad had become a part of a great system (Sept. 15, 1897), through which it got immense traffic yielding large revenues and requiring a high standard of physical excellence?

We believe that the court, when these misapprehensions are removed, will be as ready to undo the injustice done us and the Board as it seemed to be to condemn us when laboring under the misapprehensions.

We accordingly submit that there is no ground either for a personal judgment against appellant, a lien against the property, nor a complaint of the acts, either of appellant, of the Chicago, St. L. & N. O. R. R. Co., or of the Board of Valuation and Assessment.

IV.

Retrospective Assessment.

This defense (Rec. 48, par. 5) was doubtless ignored upon
169 the assumption that it was eliminated when personal judgment was entered against appellant. This judgment being

shown erroneous this defense remains good. Had a lien existed when the C., St. L. & N. O. made its purchase, Sept. 15, 1897, it would have bought subject to the lien, but there is no lien until an assessment. There may be a retrospective assessment at any time within five years as to the owner, but retrospective assessment against a purchaser is forbidden by Sec. 4021. The statute affording the retrospective assessment within five years nevertheless provides: "But the lien thereby accruing shall not prejudice the rights of purchasers acquired in the meantime."

In this case, there is not even the plausible suggestion that the purchaser knew that the taxes had not been, but ought to have been assessed, for the back years because it had always been understood in Kentucky that the Railroad Commission assessed both tangible property and franchise, and a franchise assessment by the Board of Valuation and Assessment was unheard of when the conveyance was made to the C., St. L. & N. O., Sept. 15, 1897, and unheard of until the proposition of the Board January 20, 1898, to make such assessments, and no such assessment was ever made, as above shown,
170 until March, 1899. The mischief begotten by retrospective assessment, unsettling the relations between vendors and vendees, mortgages and mortgagees, life tenants and remainder-men, etc., etc., is such that Sec. 4021 wisely provides as aforesaid concerning the purchaser, as above quoted.

As aforesaid, however, no purchaser is bound by knowledge that taxes have not been assessed (even when regularly assessable), but bound only by a lien, and the lien accrues only upon assessment. Hence the propriety of the prohibition just quoted from Sec. 4021 concerning retrospective assessment as to purchasers.

This defense would be complete, therefore, even against as assessment against appellant, or appellant's lessor, but when we find that the Commonwealth's only claim is of an assessment against the Ches., O. & S. W. R. R. Company, the claim of liability of the property, and a fortiori of the personal liability of the lessee becomes inadmissible. As above shown, even the Commonwealth did not contend for it, but withdrew its claim for the personal judgment, and asserted instead the lien in the amended petition. Of course, as aforesaid, this judgment was affirmed under the misapprehensions above pointed out.

171 V.

Limitation Law Thrown Into Confusion and Cairo Bridge Tax Case and Commonwealth v. *Nute Discredited.*

The decision upon this point unsettles and makes confusion of the doctrine settled in Commonwealth v. Nute, 115 Ky. 239, and C., St. L. & N. O. R. R. Co. v. Com., Ibid. 278 (Cairo Bridge Tax case); see, also, Commonwealth v. Rosenfield Brothers, 118 Ky. 389.

In Commonwealth v. Nute and Cairo Bridge Tax case the earlier cases were overruled, and declared based upon an obsolete policy. Also, the Act of May 23, 1890, was declared to represent the present doctrine applicable as well to railroads, and to individuals as to the

taxes of other concerns particularly specified in the Act. Thus uniformity of the law was established. This uniformity is now destroyed by this decision, and one rule declared for one person as embraced by the Act of May 23, 1890, and another for other persons. The court now says:

"But this limitation (by Act May 23, 1891), would have no effect as to taxes which might be collected by suit under other legislation without regard to the Act of 1890. At the time the Act of
172 1890 was passed there was no such thing in the State as a franchise tax."

Also says:

"This action was brought in the Franklin Circuit Court under Section 4171, Ky. Stat. It could not have been maintained under the Act of 1890, etc. * * * As it could not be brought under the Act of 1890, the limitation prescribed by the Act of 1890 is not applicable."

After declaring that Sec. 2515, Ky. Stat., applied, and reviewing L. & J. Ferry Co. v. Com., 108 Ky. 717; R. R. v. Com., 106 Ky. 329; and Railway v. Coulter, 113 Ky. 657, the court declares:

"Counsel cites the cases of R. R. Co. v. Com., 24 R. 2124 (115 Ky. 278), and Com. v. Nute, 24 R. 2138 (115 Ky. 239), but both of these cases were proceedings to assess omitted property under Sec. 4241, Ky. Stat. There is nothing in either opinion touching suits to collect taxes. The conclusion we have indicated is in accord with these cases, etc., etc."

173 Unquestionably C., St. L. & N. O. v. Com. and Com. v. Nute were proceedings under 4241, but is there "nothing in either opinion touching suits to collect taxes," and is "the conclusion we have indicated in accord with these cases?"

In the Cairo Bridge Tax case (115 Ky. 278) a railroad franchise tax, and nothing else, was involved. According to the opinion now reviewed, that being a railroad franchise tax was not embraced by the Act of May 23, 1890, as appears by the language just quoted; nevertheless, the Act of May, 1890, was invoked as the basis of the decision as well as Section 2515. Again, is it true that the Cairo Bridge Tax case makes no exposition of limitations to actions, but applies only to assessment proceedings under Sec. 4241? E contra, the reverse is true—the statutes of limitation (Act May 23, 1890, and Ky. Stat. 2515) were applied to assessment proceedings under 4241 because they were adjudged to be actions under Ky. Statutes, Sec. 469. No statute of limitation mentioned assessment proceedings, but assessment proceedings were adjudged included because they were held to be "actions." This court said (p. 282):

"By Section 469, Kentucky Statutes, in the chapter on Construction of Statutes, it is provided:
174 'The term "action," when used in this revision, shall be construed to include all proceedings in any court of this Commonwealth.'"

How, then, can it be maintained, as now declared, that there is "nothing in either opinion (115 Ky. 239; 115 Ky. 278) touching

suits to collect taxes"; or that "the conclusion we have indicated is in accord with these cases?"

Again, the court, in that case, said (p. 282):

"It is the policy of the law to put at rest stale demands of whatever character. This applies as well to taxes as to other matters."

This policy was certainly offended by the extension of time for action by the opinion just delivered.

What is true of C., St. L. & N. O. v. Com. is true of Com. v. Nute. That case was no more covered by the suits expressly mentioned in the Act of May 23, 1890, than was the railroad franchise tax; that case involved retrospective assessment of private property, viz., a dower interest in land, or the money value thereof, and the court said that the limitation to "actions" applied to the assessment proceeding, and after quoting Sec. 469 said:

175 "By this section it will be seen that this proceeding by the Auditor's Agent to back-assess for taxes is an action within the meaning of the statutes" (p. 243).

After quoting Ky. Stat. Sec. 2523 and 2515, on limitations to actions and Sec. 4021 on retrospective assessments and the Act of May 23, 1890, which was said to give power to maintain actions to recover taxes not collectible by distraint, this court said (p. 245):

"This (Act, May 23, 1890) had reference to railroads, waterworks, wharf property and other like property."

It further said that the limitation prescribed agreed with the general limitation law for the assessment of property for taxation. Concluding:

"It will hardly be contended that the Legislature intended by Section 4021 and the Act of 1890, above referred to, to give lands and the property referred to in the Act of 1890 a preference over other property. We can see no reason why the State, counties, etc., should be allowed to retrospectively assess for taxation money,

176 notes, bonds, horses, mules, cattle and other personal property, without any limitation as to time, and be limited to five years in retrospectively assessing lands, railroads, waterworks, wharf property in cities and other like property; and we do not believe that the statutes referred to will authorize any such construction."

After using this language in Com. v. Nute this court discredited, or virtually overruled, the previous cases to the contrary. It accordingly appears that this court held the Act of 1890 applicable to railroad franchises (in the Cairo Bridge Tax case) as well as to waterworks, etc., and held it applicable, in Com. v. Nute, to money, notes, etc., upon the ground that the Legislature must have intended no discrimination. The present decision is accordingly demonstrated to be in conflict with the Cairo Bridge Tax case and Com. v. Nute. Those cases are, therefore, overruled pro tanto, and, nevertheless, the court instead of declaring them overruled, announces that the present decision is in accord with what was decided in those cases. We submit that the law should not be left in this condition.

Under the opinion just delivered no action can be brought after

five years from the time when taxes might have been first
177 assessed if the property be wharf property, or any other property expressly enumerated in the Act of 1890, but as to all other property such an action may be brought at any time short of ten years. Certainly, then, the uniformity supposed to have been established in Com. v. Nute is destroyed, and the policy of discouraging "stale demands" (115 Ky. 282), although applicable to the recovery of taxes upon wharf property, etc., etc., is not applicable, under the present opinion, to any other kind of property, although the court, in Com. v. Nute, decided that no discrimination between different kinds of property must have been intended by the Legislature.

We submit that the wisdom of the policy of discouraging "stale demands" is especially applicable to taxes; that there is no reason for any discrimination between taxes upon wharf property and other taxes; that five years is long enough for the Commonwealth to assess and collect back taxes; and that no better illustration of the folly of allowing a longer time was ever afforded than the present case where the Chairman of the Board swears that the loose memoranda invoked as an assessment was never intended as an assessment, and his successor, ignorant of the true situation, sues to recover
178 taxes which the Board never intended to assess.

Conclusion.

We, accordingly, respectfully submit that the taxing officers of the State have no right to rake up loose memoranda made by their predecessors and call on citizens years afterward for many thousands of dollars when it is impossible for the real facts to be clearly ascertained, and that in this case all integrity whatever of the papers relied on is destroyed by the uncontradicted testimony of the man who made the memoranda. The Commonwealth, of all persons, should be the slowest to press uncertain claims. In any event, appellant begs that the court will revise its opinion herein so that it may be made plain that the contentions now made have been, and that the questions now urged may be, so dealt with that there will be no necessity to press them in other cases likely to arise in the course of litigation over the supposed assessment upon which judgment has been rendered.

J. H. HAZELRIGG,
TRABUE, DOOLAN & COX,
Attorneys.

J. M. DICKINSON,
Of Counsel.

179 And afterwards at a Court of Appeals held at the Capitol at Frankfort, on the 13th day of May, 1908, the following order was entered to-wit:

I. C. R. R. Co.
v.
COMMONWEALTH, ETC.

Franklin.

The Court being sufficiently advised, delivered an extended opinion herein, and it is considered that the petition of appellant for a rehearing, be and the same is overruled.

(The extended opinion mentioned in the foregoing order is in words and figures as follows, to-wit:

180 Court of Appeals of Kentucky, May 13, 1908.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Franklin Circuit Court.

Response to Petition for Rehearing by Judge Hobson.

No right of appellant under the Fourteenth Amendment to the Constitution of the United States is violated by the decision. As shown by the opinions of this court cited in the opinion herein, taxes have been imposed based on the assessments in controversy. All other tax-payers than railroads were taxed and if some railroads escaped, it is no reason that others should go free while all tax payers of other classes paid their taxes. If any railroads escaped they are still liable for their taxes unless barred by limitation.

When the board made an assessment and sent out the pre-
181 liminary and the final notices as provided by the statute that the assessment had been made its action was final and the legal effect of its action must depend on what they did and not on the secret intentions of the Auditor.

The petition for rehearing is overruled but the opinion is extended as above indicated.

T. L. EDELEN,
C. J. WHITTEMORE,
R. B. FRANKLIN,
For Appellee.

TRABUE, DOOLAN & COX,
HAXELRIGG, CHENAULT & HAZELRIGG,
J. M. DICKINSON,
For Appellant.

182 Be it remembered that on the 29th day of May, 1908, there was filed in the office of the Clerk of the Court of Appeals, an Assignment of Errors, and which are hereto attached, and are as follows to-wit:

183 Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Assignment of Errors.

Plaintiff in error, Illinois Central Railroad Company, of the State of Illinois, feeling itself aggrieved by the findings and judgment of the Court of Appeals of Kentucky in the above entitled cause, comes by its counsel and assigns errors thereto as follows, *to-wit:*

I.

Said Court of Appeals of Kentucky erred in denying the claim of said plaintiff in error to the equal protection of the laws, in holding that the plaintiff was not denied the equal protection of the law in being adjudged to pay money to the Commonwealth as taxes based upon the assumption that said plaintiff had been assessed,
184 when the acts relied upon as an assessment were simply *memoranda* upon jackets, or envelopes, made by the Board of Valuation and Assessment of the Commonwealth in respect to every railroad company in Kentucky on January 20, 1898, and February 21, 1898, and which were not intended by the said Board to be assessments of franchises or property of said railroad companies, but to be merely tentative and not final, and which were afterwards abandoned by the Board as to every railroad in Kentucky, but which is now adjudged by the said Court of Appeals to constitute a liability of the plaintiff in error alone, none of said other companies being so liable, and none of them being required to pay similar taxes, nor any taxes upon similar *memoranda* made upon similar jackets at the same time and under identically similar circumstances.

II.

Said Court of Appeals of Kentucky erred in holding and deciding that plaintiff in error was not denied due process of law in being adjudged by the said Court of Appeals liable to pay a large sum of money as taxes upon franchises and property, *to-wit,* franchises and property which said plaintiff was operating for the year in question under a power of attorney from the owner thereof, *to-wit,* Edward H. Harriman, without any assessment of said taxes against
appellant having ever been made, and when an assessment is
185 indispensable to liability for taxes.

III.

Said Court of Appeals of Kentucky erred in holding and deciding that plaintiff in error was personally liable to pay, and in adjudging it liable personally to pay a large sum of money as taxes upon

he franchises of a certain railroad not owned by the said plaintiff, ut operated by it as attorney-in-fact for the owner thereof, Edward H. Harriman, when the Commonwealth in said case had first laimed a personal judgment against said plaintiff in error upon the verment that it had purchased the said railroad and agreed to pay aid taxes as a part of the purchase price, but had afterward and before the said judgment of the circuit court from which appeal vas taken to the said Court of Appeals amended the said petition, nd retracted the said averment upon which claim for the personal udgment was based, and withdrawn the prayer for said personal udgment, and by amendment of its petition or complaint claimed nly the right to a lien upon the said railroad and franchises and he right of enforcing the said lien and selling the said property, the ircuit court and said Court of Appeals nevertheless adjudging the laintiff in error liable to a personal judgment without any pleading, averment or prayer making claim thereto.

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IV.

Said Court of Appeals of Kentucky erred in denying the claim of aid plaintiff in error to due process of law contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, in holding that a personal judgment should be rendered against the appellant, the attorney in fact of Edward H. Harriman, the owner of the railroad taxed, on account of the taxes of the said Harriman on account of his ownership of the said railroad.

V.

Said Court of Appeals of Kentucky erred in denying the claim of he said plaintiff in error to due process of law, in holding that the laintiff in error, by operating the railroad of Edward H. Harriman, became personally liable to pay the taxes accruing upon the said railroad.

VI.

Said Court of Appeals of Kentucky erred in denying the claim of aid plaintiff in error to due process of law, in holding that *memoranda* upon jackets, or envelopes, made by the Board of Valuation and Assessment of the Commonwealth of Kentucky, the same not being records or entered of record when made, constituted an assessment of taxes upon which liability could be predicated.

VII.

Said Court of Appeals of Kentucky erred in denying the claim of said plaintiff in error to due process of law, in holding that the plaintiff in error was personally liable to pay the taxes accruing upon railroad property operated by the plaintiff in error, as agent of the said Harriman.

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VIII.

Said Court of Appeals of Kentucky erred in denying the claim of said plaintiff in error to due process of law, in holding that the

plaintiff in error was not denied due process of law by being adjudged liable for taxes upon the basis of proceedings not of record.

IX.

Said Court of Appeals of Kentucky erred in denying the claim of said plaintiff in error to due process of law, in holding that the plaintiff in error was liable to assessment for taxation upon the basis of *memoranda* upon jackets, or envelopes, upon which the name of the plaintiff in error did not appear, but the name of another corporation, to-wit, the Chesapeake Ohio & Southwestern Railroad Company.

X.

Said Court of Appeals of Kentucky erred in denying the claim of said plaintiff in error to the equal protection of the laws, in holding that plaintiff in error was not denied the equal protection of the laws in being adjudged to pay money to the Commonwealth as taxes upon an assessment as based upon *memoranda* upon jackets, or envelopes, made by the Board of Valuation and Assessment of said Commonwealth on January 20th and February 21st 1898 when all the other railroad corporations in the State of Kentucky were held liable for the same period of time upon an assessment as based upon the records in the corporation tax book kept in the office of the said Board, and made upon a different standard and method of valuation.

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XI.

Said Court of Appeals of Kentucky erred in denying the claim of said plaintiff in error to due process of law, in holding that plaintiff in error was not denied due process of law in being adjudged to pay money to the Commonwealth as Taxes without an assessment having been made.

XII.

Said Court of Appeals of Kentucky erred in denying the claim of said plaintiff in error to due process of law, in holding that plaintiff in error was not denied due process of law in being adjudged to pay money to the Commonwealth as taxes based upon an assessment not of record.

XIII.

Said Court of Appeals of Kentucky erred in denying the claim of said plaintiff in error to equal protection of the laws in holding that the plaintiff in error was not denied equal protection of the laws in being adjudged to pay money to the Commonwealth of Kentucky as taxes based upon both the *memoranda* made by the Board of Valuation and Assessment of the Commonwealth upon jackets, or envelopes and upon the assessments recorded in the corporation tax books covering the same period, all other railroad companies in the State of Kentucky being held liable to pay only the assessments entered in the corporation tax book during the same period.

XIV.

Said Court of Appeals of Kentucky erred in denying the claim of said plaintiff in error to due process of law, in holding that the plaintiff was not denied due process of law by entering a personal judgment against the plaintiff in error in a court of record upon a pleading claiming only a lien and not claiming a personal judgment, and said lien being claimed upon property not belonging to the plaintiff in error but belonging to another person not a party to the cause.

189 XV.

Said Court of Appeals erred in holding and deciding that plaintiff in error was not denied the equal protection of the law, and due process of law in violation of the Fourteenth Amendment of the Constitution of the United States in being taxed upon a different principle and by a different method from other like corporations and from other railroad companies in the State of Kentucky whose franchises were assessed the same year by the same board.

EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

Filed May 29, A. D. 1908.
NAPIER ADAMS,
Clerk Court of Appeals of Kentucky.
By W. B. O'CONNELL, *D. C.*

ED. C. O'REAR,
Chief Justice Court of Appeals of Kentucky.

190 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Petition for a Writ of Error, and which is hereto attached, and is as follows:

191 Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Petition for Writ of Error and Assignment of Errors.

The above named Illinois Central Railroad Company, of the State of Illinois, conceiving itself aggrieved by the decision made and judgment rendered by the Court of Appeals of Kentucky in the cause of the above named plaintiff in error against the above named defendant in error in said court at its January and April Terms, A. D. 1908, *to-wit*, on the 27th day of February, A. D. 1908 and 13th day of May, A. D. 1908, said court being the highest court of the State of Kentucky and the court of last resort of said State for the hearing and determination of said cause, in which cause the plaintiff in error claimed the benefit of protection under and by virtue of the pro-

visions and guaranties of the Constitution of the United
192 States and especially Article 14 of the amendments to said Constitution, and the decision of said highest court of said State, *to-wit*, said Court of Appeals of Kentucky, was against the right specially set up and claimed under the Constitution of the United States by said plaintiff in error, the said right specially claimed and set up being the right to the equal protection of the laws, and to due process of law guaranteed by the said Fourteenth Amendment, the said right claimed, as aforesaid, by plaintiff in error being denied as aforesaid by said State Court;

Presents herewith its assignment of errors and prays for a writ of error to issue out of the Supreme Court of the United States to said Court of Appeals of Kentucky to the end that the record in said matter may be removed to the said Supreme Court of the United States, and the errors complained of by plaintiff in error may be examined and corrected and the judgment aforesaid of said Court of Appeals may be reviewed and reversed.

EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

Filed May 29th, 1908.

ED. C. O'REAR,
Chief Justice Court of Appeals of Kentucky.

Filed May 29th, 1908.

NAPIER ADAMS, *C. C. A.*,
By W. B. O'CONNELL, *D. C.*

193 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error from the Supreme Court of the United States, and the order allowing same by the Chief Justice of the Court of Appeals of Kentucky, and which is hereto attached, as follows:

194 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky, being the highest court of law or equity of the said State of Kentucky in which a decision could be had in the said suit between the Illinois Central Railroad Company of the State of Illinois, plaintiff, and the Commonwealth of Kentucky, defendant, wherein the plaintiff in error claimed the benefit of protection under and by virtue of the provisions and guaranties of the Constitution of the United States and especially Article Fourteen of the amendments to said Constitution, and the decision of the said highest court of said State, *to-wit*, said Court of Appeals of Kentucky, was against the right specially set up and claimed under the Constitution of the United

States by said plaintiff in error, a manifest error hath happened to the great damage of the said Illinois Central Railroad Company of the State of Illinois as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 28th day of June, A. D. 1908 in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 29th day of May in the year of our
195 Lord, one thousand nine hundred and eight.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk of the United States Circuit Court, Eastern District of Kentucky, at Frankfort.

Allowed by

ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

Filed May 29th, 1908.

NAPIER ADAMS,
Clerk of Court of Appeals,
By W. B. O'CONNELL, *D. C.*

196 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures as follows to-wit:

197 Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, Plaintiff in Error,
vs.
THE COMMONWEALTH OF KENTUCKY, Defendant in Error.

Bond.

Know all men by these presents: That the Illinois Central Railroad Company, principal, and Edmund F. Trabue, surety, are held and firmly bound unto the above named The Commonwealth of Kentucky in the sum of twelve thousand seven hundred and fifty ($12,750.00) Dollars to be paid to the obligee herein, to which payment well and truly to be made we bind ourselves and each of us

jointly and severally and our and each of our successors, executors, heirs and administrators firmly by these presents:

Sealed with our seals and dated the 29th, day of May, A. D. 1908.

ILLINOIS CENTRAL RAILROAD COMPANY,

[SEAL.] By EDMUND F. TRABUE, *Attorney.*

Attest:
C. S. WILSON.

[SEAL.] EDMUND F. TRABUE.

Attest:
C. S. WILSON.

198 Whereas, the above named Illinois Central Railroad Company of the State of Illinois has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered on the 27th, day of February and May 13th, 1908, by the Court of Appeals of Kentucky in the case of the said Illinois Central Railroad Company, of the State of Illinois against the said Commonwealth of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named Illinois Central Railroad Company, of the State of Illinois, shall prosecute its writ of error to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

Sealed in the presence of us this 29th day of May, A. D. 1908.

C. S. WILSON.

Attest:
W. B. O'CONNELL.

Approved by me this 29th day of May, A. D. 1908.

ED. C. O'REAR,
Chief Justice Court of Appeals of Kentucky.

Filed May 29, 1908.
NAPIER ADAMS,
Clerk Court of Appeals of Kentucky,
By W. B. O'CONNELL, *D. C.*

199 And on said date there was filed in the office of the Clerk of the Court of Appeals, the original Citation, and the proof of service endorsed thereon, and which is hereto attached as follows:

200 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at Washington, on the 28th day of June next, pursuant to a Writ of

Error filed in the Clerk's office of the Court of Appeals of Kentucky, wherein the Illinois Central Railroad Company, of the State of Illinois, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this Twenty-ninth day of May in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-second.

ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
NAPIER ADAMS,
Clerk Court of Appeals of Kentucky,
By W. B. O'CONNELL, *D. C.*

Service of this citation acknowledged this the 29th day of May, A. D. 1908.

JAMES BREATHITT,
Attorney General,
Counsel for Defendant in Error.

Filed May 29, 1908.
NAPIER ADAMS,
Clerk Court of Appeals of Kentucky,
By W. B. O'CONNELL, *D. C.*

201 COMMONWEALTH OF KENTUCKY,
The Court of Appeals, sct:

In obedience to the commands of the attached Writ of Error, I herewith transmit to the Supreme Court of the United States a complete transcript of the entire record, with all things concerning the same, as same appears from the records and files of my office.

In Testimony Whereof, I have hereunto subscribed my name, and affixed my official seal. Done at the Capitol at Frankfort, this the 19th day of June, A. D. 1908.

[Seal Kentucky Court of Appeals.]

NAPIER ADAMS,
Clerk Court of Appeals of Kentucky,
By W. B. O'CONNELL,
Deputy Clerk.

Endorsed on cover: File No. 21,238. Kentucky Court of Appeals. Term No. 186. Illinois Central Railroad Company of the State of Illinois, plaintiff in error, vs. The Commonwealth of Kentucky. Filed June 26th, 1908. File No. 21,238.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 16

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

COMMONWEALTH OF KENTUCKY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EDMUND F. TRABUE,
BLEWETT LEE,
Counsel for Plaintiff in Error.

JOHN C. DOOLAN,
ATTILLA COX, JR.,
Of Counsel.

GUNTHORP-WARREN PRINTING CO., CHICAGO

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 16

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

COMMONWEALTH OF KENTUCKY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error (Rec., 84) to the Court of Appeals of Kentucky, the highest court of the State, to reverse a judgment of that court entered January 21, 1907 (Rec., 34), against plaintiff in favor of defendant in error, for $10,219.97 for taxes, and $1,021.99 penalty and costs.

The taxes were claimed as due for the year 1897, upon the franchise of the Chesapeake, Ohio & South-

wester R. R. Company (hereinafter called the Chesapeake Co.), an insolvent corporation in the hands of John Echols and St. John Boyle, Receivers, whose railroad, property and franchises had been sold to Edward H. Harriman, on July 25, 1896, and were being operated by plaintiff in error, Illinois Central R. R. Company (hereinafter called the Illinois Co.), under power of attorney, dated August 19, 1896 (Rec., 7, 8), filed as Exhibit A, with the Commonwealth's petition (complaint). The taxes were never claimed as due upon the franchise of the Illinois Co.

The property purchased by Harriman, as aforesaid, was by him conveyed September 15, 1897 (Rec., 32), to the Chicago, St. Louis & New Orleans R. R. Co. (hereinafter called the New Orleans Co.).

This case originated in a petition (Rec., 1) filed by the Commonwealth against the Chesapeake Co. and the Illinois Co. to recover franchise taxes for the years 1896 and 1897, upon the claim that they had been assessed under Ky. Stat (4077 *et seq.*) by the State Board of Valuation and Assessment upon the franchise of the *Chesapeake Co.*, and—speaking of the Chesapeake Co.—that

> "by some contract between itself and the Illinois Central R. R. Company, its co-defendant, or between the stockholders in the Chesapeake, Ohio & Southwestern R. R. Company and the Illinois Central R. R. Company, the exact *term* of which are unknown to this plaintiff, the Illinois Central acquired possession of the property of the defendant Chesapeake, Ohio & Southwestern R. R. Company, and as a partial consideration for said acquisition covenanted to pay to the Commonwealth all taxes *accrued or accruing, for which the said Chesapeake, Ohio & Southwestern R. R.*

Company was or was to be liable, together with interest and penalties upon same. And that afterwards, to wit, on the 31st day of October, 1896, the said Illinois Central Railroad Company in behalf of the Chesapeake, Ohio & Southwestern Railroad Company made to the Auditor of Public Accounts of this Commonwealth a report for franchise tax purposes ..... and that afterwards, to wit, on the ..... day of ....., the Auditor of Public Accounts with his associates upon the Board of Valuation and Assessment duly and properly made an assessment of the franchise of the said Chesapeake, Ohio & Southwestern Railroad Company, etc. Wherefore the Commonwealth prayed judgment *in personam* against both defendants for the taxes, penalties and costs." (Rec., 3.)

As alleged in the petition aforesaid, reports had been made to the State Auditor according to specifications of Ky. Stats., Sec. 4078, covering the property of the Chesapeake Company for the years 1896 and 1897, the first for September 15, 1895, and signed "John Echols, General Manager" (Rec., 13); the second for September 15, 1896, signed "J. C. Welling, Vice President, Ill. Cent. R. R. Co." (Rec., 24.)

The reports were entitled as follows: Report for 1896 (Rec., 11):

> *"Report of the Chesapeake, Ohio & Southwestern R. R. Co. to the Auditor of Public Accounts of Kentucky, September 15, 1895,"* and

Report for 1897 (Rec., 22):

> *"Report of the Chesapeake, Ohio & Southwestern R. R. Co. (operated by Illinois Central Railroad Company, Agent) to the Auditor of Public Accounts of Kentucky, September 15, 1896."*

These reports were made, as aforesaid, according to provisions of Sec. 4078, Ky. Stats. (Rec., 11, 22), and taxes on them were assessable under Secs. 4079 and 4081 (see appendix for Secs. 4077-8-9, 4081, and other statutes cited), providing for a valuation by the board of the capital stock of the railroad company and a deduction from such valuation of the value of the tangible property of the company as assessed by the Railroad Commission under Sec. 4096, Ky. Stats. *Henderson Bridge Co.* v. *Ky.*, 166 U. S., 150.

When these reports were made September 15, 1895, and September 15, 1896, respectively, no separate assessment of franchise taxes against railroad companies *had ever been made in Kentucky,* the railroad and property of railroad companies having been theretofore assessed against them *as common carriers of freight and passengers* by the Railroad Commission, under Sec. 4096 *et seq.* (See testimony of State Auditor Stone, Rec. 48 *et seq.; Railway* v. *Coulter,* 113 Ky., 657, 665; Opin., Rec., 59.) When Stone became Auditor he obtained from his predecessor, Norman, and the latter's colleague upon the board, Headley, affidavits showing that they had regarded the Railroad Commission's assessment a complete assessment of both tangible and intangible property of the railroad companies, and had, therefore, never made an assessment. (Rec., 53.) The railroad companies of the State, as appears, had made reports as well under Sec. 4077 as under 4096, aforesaid, doubtless because of the peril of heavy penalties. The Statutes were enacted in 1893, and, although the reports were made as aforesaid, no assessment

under Sec. 4077 was ever attempted until January 20, 1898, nor any ever concluded until 1899 (Rec., 48, 50).

Plaintiff in error, the Illinois Co., answered the petition aforesaid (Rec., 5), traversing its material allegations. This answer was filed January 13, 1903, and, thereupon, January 21, 1903, the plaintiff filed an amended petition (Rec., 6).

The amended petition radically changed the proceeding, converting it from an action *in personam* to a suit for foreclosure of lien. It alleged:

> "That it was error in alleging in the first paragraph of its original petition that the defendant, the Illinois Central Railroad Company by some contract between itself and its co-defendant or the stockholders of its co-defendant acquired possession of the property of said Chesapeake & Ohio Southwestern Railroad Company, and as a partial consideration for said acquisition covenanted to pay to the Commonwealth all taxes accrued or accruing for which the said Chesapeake & Ohio Southwestern Railroad Company was or was to be liable, together with interest and penalties upon same. The plaintiff now prays that said allegations may be stricken from the original petition, and in lieu thereof it now asserts: That after the defendant Chesapeake & Ohio Southwestern Railroad Company had made the report set out in the first paragraph of plaintiff's original petition and when the property of the said Chesapeake & Ohio Southwestern Railroad Company was in lien to this plaintiff for its taxes, one Edward H. Harriman became the purchaser of said property by some contract to the plaintiff now unknown, and afterwards, to-wit, on the 19th day of August, 1896, the said Edward H. Harriman transferred the property of the Chesapeake &

> Ohio Southwestern Railroad Company to the Illinois Central Railroad Company by an instrument of writing, a copy of which is now filed herewith as part hereof marked 'A.'
>
> And now plaintiff states further that by virtue of the assessment of the franchise of the Chesapeake & Ohio Southwestern Railroad Company as set out in Paragraph 1 of its original petition it, this plaintiff acquired a lien upon the assets, tangible and intangible, of the Chesapeake & Ohio Southwestern Railroad Company, for taxes upon defendant's franchises, for interest and for penalty upon same; which lien plaintiff is advised and now states is a subsisting lien upon *said property in the hands of the Illinois Central Railroad Company.*" (Italics ours.)

Concerning taxes for 1897, the Commonwealth in its second paragraph alleged (Rec., 7)

> "that after the execution and delivery of the written contract set out in Paragraph 1 of this amendment, and while the Chesapeake & Ohio Southwestern Railroad Company was being operated by its co-defendant, the Illinois Central Railroad Company, as set out in said first paragraph, the defendant, Illinois Central Railroad Company *in behalf of the Chesapeake & Ohio Southwestern Railroad Company** made to the Auditor of Public Accounts a report for *franchise tax purposes of the Chesapeake & Ohio Southwestern Railroad Company.*" (Italics ours.)

Accordingly, the Commonwealth prayed that its amendment might be read into and as a substitute for the original petition so far as inconsistent therewith and prayed as follows (Rec., 7):

> "And having amended its original petition, it

*By a clerical error the passage just italicized is omitted in copying this passage, at the top of page 10 of the brief of the defendant in error.

prays for an enforcement of its lien for the amounts set out in its original petition, for costs penalties and for all proper relief."

It was upon this amended petition, nevertheless, that the judgment aforesaid (Rec., 34) was rendered against plaintiff, the Illinois Company, *in personam*, and no judgment, in accordance with the plaintiff's prayer, enforcing the lien upon the property of the Chesapeake Company, was ever rendered.

For the Harriman power of attorney to plaintiff, Illinois Company, filed as Exhibit "A" with the Commonwealth's petition, see Rec., 8.

To the amended petition, plaintiff, the Illinois Company, filed answer (Rec., 30) April 26, 1904, (1) Averring the ownership by the New Orleans Company, a Kentucky corporation, of the property purchased by Harriman as aforesaid, and which was conveyed by him to said New Orleans Company September 17 (15th), 1897, and pleading a defect of parties defendant; (2) Contesting the lien asserted by the Commonwealth and denying the operation by the Illinois Company, in the manner alleged; (3) Pleading the five years Statute of Limitations; (4) Alleging the foreclosure sale to Harriman, his continued ownership until September 15, 1897, his sale to the New Orleans Company, and alleging (Rec., 32):

"That the taxes claimed in the petition were not nor was any part thereof assessed, nor was any attempt or endeavor made by any officer of plaintiff to assess them at or any time before the purchase or conveyance made to the said Chicago, St. Louis & New Orleans Railroad Company on September 15, 1897."

The case was transferred to equity (Rec., 34) and, presumably, when the amended petition was filed January 21, 1903.

The affirmative allegations of plaintiff, the Illinois Company's answer, were uncontroverted, no reply being filed.

Two witnesses testified, Ex-Auditor Samuel H. Stone (Rec., 48) and Polk Laffoon (Rec., 53). The testimony of these witnesses, respectively, is duplicated in the record (Rec., 35, 41) by oversight.

From the testimony of Stone and Laffoon it appears that Stone was State Auditor from January, 1896, to January, 1900. Laffoon was in the Auditor's office subsequently to 1899 (Rec., 54), but for what period does not appear.

When Stone became Auditor the assessment of railroad property had been "entirely in the hands of the Railroad Commission" (Rec., 48). In 1898, the Board concluded to attempt franchise assessment of railroad companies under *Sec. 4077 et seq. Ky. Stats.*, and made tentative assessments of railroad franchises and sent out notices of final assessment, being then in controversy with the railroad companies concerning the right of the Board to assess property which had theretofore been assessed solely by the Railroad Commission (Rec., 48. See also *R'y Co.* v. *Coulter,* 113 Ky., 657, 665), but made no record of any assessment. The Board being uncertain of its position, re-opened the cases and finally made assessments in 1899 (Rec., 48, 49)—which were recorded in the CORPORATION TAX BOOK.

In 1899 an amount of money was assessed against

the Illinois Co. to be in full for all the properties then operated by that company, including the Chesapeake Co., for the *four years next preceding* (Rec., 49). Stone testifies (Rec., 49):

> "In other words, the agreement of the board was to re-consider these assessments entirely, and take them back, in consideration of the fact that the road would pay the next two assessments on the basis agreed upon. When I went out of the office, we considered that the entire railroad assessment of the State had been settled for those four years, and that we had passed on it amply, as best we could."

The so-called final notices of February 21, 1898 (Rec., 49),

> "were afterwards re-considered and done away with in all cases, in every railroad in the State, not only this road, were afterwards re-considered and taken back, not only because there were new ones, but because we did away with these assessments entirely."

The so-called assessments of January and February, 1898, were not regarded by the board as assessments against any railroad in the State, but were threats in order to bring the railroad companies before the board for discussion and assessment. *It was not expected that any of the railroad companies would pay the amounts indicated in such so-called* 1898 *assessment* (Rec., 50). Stone says, "We—I did not expect any tax to be paid on this final assessment in 1898." (Rec., 50.) The final assessments for the years in question were made in 1899. Stone says (Rec., 50), when asked:

> "When was this matter finally taken up by

the board and the assessment against the railroads of the State completed?

Some time in the winter of 1899—the records will show the exact date."

The records exhibited, Stone says (Rec., (51):

"The final assessment, on which the taxes were paid, was made on February 17th, in most cases, along during the months of February and March.

Q. What year?

A. 1899.

Q. Were the taxes that you have stated were all paid when you left the Auditor's office, paid upon the assessment of February or March, 1899, to which you have just referred, or on some other?

A. Paid on the assessment made in the winter of 1899, in February or March."

The real assessments for the years in question on which taxes were paid were made March 1, 1899, and the taxes were paid March 27, 1899 (Rec., 51). The reports made on behalf of the railroad companies were made upon forms (see Rec., 11, 22). These reports were kept in jackets or envelopes, bearing endorsements (Rec., 10½, 24½). This suit is based upon a so-called assessment which had *no record whatever as a basis,* but which was predicated upon the endorsements upon the envelopes aforesaid (Rec., 10½, 24½). These endorsements, as the record in this case shows, were *unsigned* and in whose handwriting they were, does not appear. *There is nothing to indicate that they were meant as a record of assessment.* Auditor Stone, Chairman of the Board of Valuation & Assessment, says, concerning them, when asked (Rec., 53):

"Q. 28. Did you know that after March, 1899,

there were any such papers in the Auditor's office as those of which Exhibits E and D, filed with the petition, are copies?

A. No, I would not have laid any stress on it if I had known it. Those were simply memoranda."

The Chesapeake Co. was in receivers' hands in 1895, and when sold to Harriman in 1896 (Rec., 52), the company was insolvent (Rec., 52).

The *memoranda* upon which the taxes in this case are claimed are merely endorsements upon envelopes kept to hold the reports aforesaid of the railroad companies, and it happened that within the envelopes containing reports 27 and 34 for 1895 and 1896 respectively were found the backs of other envelopes bearing *memoranda* showing smaller amounts as proposed, apparently, as assessments for those years (Rec., 51, Q. 17).

The franchises of all the railroad companies in the State were assessed in 1899 for the years 1896, 1897, 1898 and 1899 and recorded in the book kept for the purpose and called "REPORTS OF CORPORATION FRANCHISES, MISCELLANEOUS AND RAILROADS" (Rec., 50, 51; Stone Q. 10; Rec., 53, Stone XQ. 1).

The assessment made in 1899 *and recorded in this book* was made against the Illinois Company and covered all the lines which it operated in the State, including the Chesapeake Company's line (Rec., 53, X A 1).

In this book there was no record of any assessment prior to 1899, except of the Mobile & Ohio R. R. Company, proposed in 1898, and that company's so-called 1898 assessment was abandoned, with all the

rest, and in lieu thereof a decisive assessment was made in 1899, and the amount thereof paid (Laffoon, Rec., 53-4).

The method adopted by the Board with the inchoate assessments of 1898, whereby they were supplanted by the real assessments of 1899, is illustrated by the jackets, or envelopes, copies whereof are filed with Laffoon's testimony (Rec., 55 *et seq.*), wherein it appears that the report of the Mobile & Ohio R. R. Company (taken as an example), of September 15, 1895, was enclosed in jacket No. 20, and afterward in jacket 30, and that the *endorsement* upon jacket 20 was *also* enclosed in jacket 30.

The report for September 15, 1896, was first in jacket 18 and afterward in 32, the endorsement upon jacket 18 being found in jacket 32. The same is true of other years as appears from the exhibits.

Upon jacket 30 appears:

"When corporation was first notified—January 20, 1898.
Final notice—February 21, 1898.
Second final notice—October 6, 1899."

It thus appears, and it is proved by Laffoon (Rec., 54) that the so-called final notice of February 21, 1898, was ignored and a decisive final notice given October 6, 1899.

From the back of *jacket 20,* "found in jacket No. 30," "the capital stock" was fixed at $1,676,827, which, less tangible, $676,559, left a franchise of $1,000,268. *This was the franchise tax fixed for the Mobile & Ohio R. R. Company when the amounts for which the Chesapeake Co. was sued were fixed, in the tentative way explained by Stone* (Rec., 11, 25).

The parallel procedure in the case of the Mobile and Ohio Railroad Company is shown by the slips cut from the backs of the old jacket Nos. 18 and 20, and it appears from the back of jacket 30 that instead of $1,676,827, the capital was finally fixed at $750,950, *leaving*, after deducting tangible, $676,559, *franchise $74,391 instead of $1,000,268.*

The great discrepancy between $1,000,268 and $74,391, confirms the testimony of Stone that it was never intended—indeed, it could never have been intended—to fix the original sums irrevocably. Consequently no record was made of them.

Upon the slip for September 15, 1896, cut from the old jacket and enclosed in the new, appear the words, "Changed October 2, 1899" (see jackets 18 and 32). The revised amounts were recorded in the Corporation Tax Record.

The Board, *which had never previously made a record* (Rec., 50), but had simply endorsed *memoranda* upon jackets, or envelopes (Rec., 53), and done so only as "*memoranda*" of sums to be threatened solely for the purpose of bringing the railroad companies into conference with the Board (Rec., 48, 49), consistently treated their action as inchoate, or ambulatory, Auditor Stone saying (Rec., 53):

> "Those were simply memoranda,"

and saying (Rec., 48):

> "We considered this subject, and re-opened the matter, and re-classed the railroads, and they paid it."

When the roads "were re-classed" (Rec., 48), and the real assessments were made and paid (Rec., 51),

the proposed assessment of the franchise of the New Orleans Company was raised from $1,904,000 to $2,114,584 for 1896, and from $2,272,380 to $2,404,500 for 1897, and all threat to make the previously proposed franchise assessments on the property of the Chesapeake Co. was abandoned but what the connection between the two acts was Auditor Stone fails to recall (Rec., 51, 52).

The assessment made in 1899 "as a matter of fact, (it) included all the properties operated by the Illinois Central" (X-1, A. *et seq.*, Rec., 53). The Chesapeake Co.'s properties were then owned by the New Orleans Company, which had purchased them September 15, 1897 (Rec., 32).

When, however, we see that the franchise assessments of other railroad companies, like the Mobile and Ohio's, were so largely reduced in the final operation of the Board, and those of the New Orleans Company so increased, the only explanation is that found in Stone's testimony (Rec., 49), where he says:

> "In this assessment, the second assessment in 1899, we made, as I stated, a considerable reduction from the original assessment, and, in the matter of the Illinois Central Railroad Company we agreed not to assess the C. & O. S. W. for the first two years, we agreed that,—in other words, that the amount we assessed against the Illinois Central should be in full for all the properties they controlled for four years, this assessment, and the one sent out as final in 1898 we reconsidered and declined to assess any franchise tax against that road for one or two years, for the first years,—two years, I think. In other

words, the agreement of the Board was to reconsider these assessments entirely and take them back, in consideration of the fact that the road would pay the next two assessments on the basis agreed upon. When I went out of the office, we considered that the entire railroad assessment of the State had been settled for those four years, and that we had passed on it amply, as best we could."

In the assessment of the Illinois Co., the tangible property of the New Orleans Company was deducted from the stock value (Rec., 54, 55).

The judgment of the Circuit Court was affirmed by the Court of Appeals (Rec., 57) upon an opinion delivered February 27, 1908 (Rec., 58). A petition for a rehearing was filed (Rec., 63) and the Court of Appeals delivered response (Rec., 79) as follows:

"No right of appellant under the Fourteenth Amendment to the Constitution of the United States is violated by the decision. As shown by the opinions of this court cited in the opinion herein, taxes have been imposed based on the assessments in controversy. All other tax-payers than railroads were taxed and if some railroads escaped, it is no reason that other should go free while all tax-payers of other classes paid their taxes. If any railroads escaped they are still liable for their taxes unless barred by limitation.

When the Board made an assessment and sent out the preliminary and the final notices as provided by the statute that the assessment had been made its action was final and the legal effect of its action must depend on what they did and not on the secret intentions of the Auditor.

The petition for rehearing is overruled but the opinion is extended as above indicated."

On p. 10 of the brief of the defendant in error the following statement occurs:

> "The answer to the petition, or bill, as amended, may be found at page 30 of the transcript. There is no allegation in that answer of any satisfaction of the claim or of any payment, nor is there any denial that the assessment was made as specifically alleged in the bill as amended."

But this statement evidently overlooks the answer of the Illinois Central Railroad Company at page 5 of the printed record, which denies everything in the original petition and the answer of the Illinois Central Railroad Company to the amended petition found in p. 30 of the printed record, denies everything in the amended petition.

The statement is made in the brief for defendant in error that the assessment for franchise tax sued upon in the present case was made upon precisely the figures fixed by the railroad company. Presumably this refers to the report made by the Illinois Central Railroad Company as agent of the C. O. & S. W. R. R. Co. If so, that report will be searched in vain for any evidence that the total capital of the C. O. & S. W. R. R. Co. was $6,700,000.00; while the tangible property is therein stated to be $2,874.597.00 (Rec., 24), not $4,753,339.00 as stated on the envelope. The record does not show how the supposed assessment for franchise tax was computed.

It appears on p. 13 of the brief of the defendant in error that it is not denied that notice of the assessment was sent to the Illinois Central Railroad Company. There is no evidence in the record on this subject except the memorandum upon the en-

velope opposite p. 24 of the record, from which it appears that the corporation notified was the Chesapeake, Ohio & Southwestern Railroad Company. Even if the Illinois Central Railroad Company had been notified, notice that the Chesapeake, Ohio & Southwestern Railroad Company had been assessed would not impose any liability upon the Illinois Central Railroad Company. If it bound anyone, it bound the Chesapeake, Ohio & Southwestern Railroad Company.

So far as it is said by the defendant in error that we cannot import into the record any facts or issues not shown by the record, the evidence that the plaintiff in error was treated differently from other corporations similarly situated abundantly appears in the record. On p. 36 of the record Samuel H. Stone testifies as follows:

> "The board labored a good deal in trying to make an equitable assessment of railroad property. In the year, the winter of 1898, we had never come to any conclusion with the roads, and after a good deal of argument and discussion of the matter, we made a tentative assessment against the railroads, and at the end of thirty days we sent out notice of final assessment, on a very much larger valuation than was afterwards fixed, after the railroads still contested and declined to pay it, and argued the question for another year. We were unwilling to force a conclusion, because we were not sure of our ground, and in the winter of 1899, we had a general consultation with the roads of the State, and they agreed to pay us on a certain basis of valuation, if we would reopen the cases, and this we consented to do. * * *
>
> We considered this subject, and reopened the

matter, and reclassed the railroads, and they paid it. * * * We did this for two reasons,—one, because we were somewhat doubtful of our rights in the case, and more especially to establish a precedent, get the railroads to acknowledge our rights,—our right to assess,—and to pay the assessment, and to thereby establish a precedent, by which they would hereafter be compelled to pay, or probably would be. In this assessment, the second assessment in 1899, we made, as I stated, a considerable reduction from the original assessment, and, in the matter of the Illinois Central Railroad Company, we agreed not to assess the C. & O. S. W. for the first two years, we agreed that,—in other words, that the amount we assessed against the Illinois Central should be in full for all the properties they controlled for four years, this assessment, and the one sent out as final in 1898 we reconsidered and declined to assess any franchise tax against that road for one or two years, for the first years,—two years, I think. In other words, the agreement of the board was to reconsider these assessments entirely, and take them back, in consideration of the fact that the road would pay the next two assessments on the basis agreed upon. When I went out of office, we considered that the entire railroad assessment of the State had been settled for those four years, and that we had passed on it amply, as best we could.

Q. 3. Please examine Exhibits 'E' and 'D,' filed with the plaintiff's petition, and state whether or not any final notice was given under those, as indicating a final assessment, and which was intended by the board as a final assessment for the amounts indicated on those jackets. * * *

A. Those are copies, I think,—yes, these are correct copies of the jackets in these matters, and shows that final notice was given February 21st, 1898, but, as I stated in answer to the other

question, these were afterwards reconsidered and done away with in all cases, in every railroad in the State, not only this road, were afterwards reconsidered and taken back, not only because there were new ones, but because we did away with these assessments entirely."

ASSIGNMENT OF ERRORS.

The assignments of error (Rec., 80) are:

1. The denial of the equal protection of the laws in violation of the Fourteenth Amendment in holding plaintiff, the Illinois Co., upon a so-called assessment of January 20, 1898, and February 21, 1898, not intended by the Board as an assessment, and abandoned as to every other railroad company in Kentucky similarly threatened in 1898, all being finally assessed in 1899 for the taxes in question.

2. The denial of due process of law, contrary to the said Fourteenth Amendment, in being compelled to pay while operating a railroad simply as agent, without any assessment of taxes against plaintiff, the Illinois Co., an assessment being indispensable to liability for taxes.

3. The denial of due process of law, contrary to the Fourteenth Amendment to the Federal Constitution, in rendering a judgment *in personam* against plaintiff, the Illinois Co., for the taxes of the owner while plaintiff was simply agent, when the Commonwealth's petition (declaration), at first claiming the judgment *in personam* (upon a different ground), was entirely abandoned, and the prayer for personal

judgment withdrawn (Rec., 6, 7), and in lieu thereof a suit in equity to foreclose a lien upon the property for the debt of the Chesapeake Co. substituted (Rec., 6, 7).

4. The denial of due process of law, contrary to the said Fourteenth Amendment, in the rendition of a personal judgment against plaintiff, the Illinois Co., for the taxes on the railroad and franchise which it operated solely as agent of the owner.

5. The denial of due process, contrary to the said Fourteenth Amendment, in holding that *memoranda* upon the jackets, or envelopes, not being records or entered of record when made, constituted assessments of taxes upon which liability could be predicated.

6. The denial of due process of law, contrary to the said Fourteenth Amendment, in holding plaintiff, the Illinois Co., liable for taxes upon the basis of proceedings not of record.

7. The denial of due process of law, contrary to the said Fourteenth Amendment, in holding liable said plaintiff in error upon the basis of memoranda upon jackets, or envelopes, upon which the name of plaintiff, the Illinois Co., did not appear as involved, but the name of another company, *to-wit,* the Chesapeake Co., appeared.

8. The denial of the equal protection of the laws, contrary to the said Fourteenth Amendment, in adjudging plaintiff in error to pay money as taxes upon an assessment assumed to be based upon *memoranda* on jackets, or envelopes, made January 20th and February 21, 1898, when all other railroad corporations of Kentucky were held liable for the same pe-

riod of time for an assessment based upon records in the *Corporation Tax Book* kept in the office of the Board, and assessments made upon a different standard and method of valuation.

9. The denial of due process, contrary to the said Fourteenth Amendment, in holding plaintiff in error liable without an assessment of taxes.

10. The denial of the equal protection of the laws, contrary to the Fourteenth Amendment aforesaid, in being adjudged to pay money as taxes based upon both the memoranda made upon the jackets, or envelopes, and upon assessments recorded in the corporation tax book, covering the same period, all other railroad companies in Kentucky being held liable to pay only the assessment entered in the corporation tax book covering the same period of time.

11. The denial of due process of law, contrary to the said Fourteenth Amendment, by holding plaintiff in error, the Illinois Co., liable *in personam* upon a pleading claiming only a lien upon the property of the Chesapeake Co., and not claiming a personal judgment against plaintiff in error, the Chesapeake Co.'s property at said time belonging to the New Orleans Company, which was not a party to the cause (Rec., 32).

12. The denial of the equal protection of the law, and of due process, contrary to the said Fourteenth Amendment, in being taxed upon a different principle and by a different method from other like corporations, and from other railroad companies in Kentucky, whose franchises were assessed the same year by the same Board.

ARGUMENT.

JURISDICTION.

There is no doubt of this court's jurisdiction, for the Kentucky Court, as appears *supra* (p. 15), not only decided the federal questions, but in passing upon them extended its opinion previously delivered in order to cover them. (Rec., 79.) The petition for rehearing overruled by the court, and which presents the questions involved in this writ of error, will be found in the Record beginning at page 63.

If the State Court decided the Federal questions, although first appearing in the petition for rehearing, this court takes jurisdiction; *Mallett* v. *North Carolina*, 181 U. S., 589, 592; *Leigh* v. *Green*, 193 U. S., 79, 85; *Sullivan* v. *Texas*, 207 U. S., 416, 422.

In *Sullivan* v. *Texas* this court said (p. 422):

> "The constitutional question, although not raised theretofore, was distinctly presented in the petition to the Court of Civil Appeals for a re-hearing, was considered by that court and decided adversely to plaintiff in error. This court, therefore, has jurisdiction." citing authorities.

Indeed, the court below could not possibly have reached its conclusion without deciding the Federal questions, for they are necessarily involved in the result reached. The plaintiff in error contended throughout that there was no assessment of taxes against it, that no other railroads in the State were similarly treated, and that a personal judgment was not admissible on the pleadings after they had been amended.

Assessment by a Different and More Burdensome Method.

Assuming, for the purpose of discussion, the envelope endorsement to be a record of assessment, the assessment would, nevertheless, deny due process, and the equal protection of law because all other railroads of the State were assessed and paid franchise taxes upon a different basis, or method of assessment (Stone, 49).

The case thus presented is within the principle expounded in *Raymond* v. *Chicago Traction Co.*, 207 U. S., 20. This court there said (p. 36) that the board failed to equalize the assessments of the appellees, "the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year." The court further said (page 37):

> "The result is an enormous disparity and discrimination between the various assessments upon the corporations."

Again (page 37):

> "This action resulted in an illegal discrimination, which, under these facts, was the action of the State through the board."

Again this court said (page 38):

> "It is not a question of mere difference of opinion as to the valuation of property, but it is a question of difference of method in the manner of assessing property of the same kind. Although the law itself may be valid and provide for a proper valuation, yet if, through mistake

> on the part of the State, through its Board of Equalization and while acting as a *quasi*-judicial body, the board erred in the method to be pursued in relation to the corporations now before us, the mistake is one which may be corrected in equity."

The principle thus expounded is exactly applicable here because all the railroad companies in the State were inchoately assessed in January and February, 1898, exactly as the Chesapeake Company is claimed to have been assessed, and upon their appearing before the board and exhibiting the real situation, the board discarded the entire work respecting them and made real assessments, *a year later*, which were entered in the corporation tax book and paid. Nevertheless, this particular case is now singled out and action brought on it. To treat such *memoranda* as a record of assessment and impose the liability proposed in this case would assess it upon a different basis and by a different method from all other railroads in the State—and at enormous sums greatly exceeding in proportion those assessed against any other company.

The difference between the sums originally proposed and those finally assessed is so enormous as virtually to demonstrate that the original figures were not meant seriously, and, accordingly, to apply such figures to this particular road while the smaller figures later adopted have been applied to all others, would deny the equal protection of the law by assessing according to a different method or basis.

The difference between the original and the more lately-adopted figures is shown by comparison of the

amount of the judgment in this case (Rec., 34): $10,219.97 as taxation for 1897 upon a single branch of the roads operated by plaintiff in error, the Illinois Co., and the sum fixed by the board a year later as the amount proper for assessment as taxes upon all the lines operated by that company in 1897, *viz.*, $2,161.37, and by a comparison of jacket 20 and jacket 30 (Rec., 54½) where the franchise valuation proposed for the Mobile & Ohio Railroad Company in January, 1898, was $1,000,268 and the franchise assessed in 1899 $74,391.00. See also the other jacket *memoranda* for the other years on the Mobile & Ohio Railway franchise.

Nor does it assist the Commonwealth's claim to say that the subsequent action of the State Board abrogating its previous acts as to the other companies might still be disregarded unless barred by limitation, because—

First, limitation bars and, *secondly*, there is nothing to indicate that the State proposes or ever intended to attempt to undo as to the other companies its action of 1899, and both cannot stand. The case is one of spoliation pure and simple, of an arbitrary exaction without justice or reason.

See also upon the general principle *Railroad* v. *Board*, 85 Fed., 302, 303; *Nashville, etc., Co.* v. *Taylor*, 86 Ibid., 168; *Lou. Trust Co.* v. *Stone*, 107 Ibid., 305, per Mr. Justice Day. See also *Nat'l Bank* v. *Kimball*, 103 U. S., 732, 735; *Stanley* v. *Supervisors*, 121 U. S., 535, 550; *San Francisco Bank* v. *Dodge*, 197 U. S., 70, 81.

That *Coulter* v. *R'y Co.*, 196 U. S., 599, is distinguishable see *Raymond* v. *Chicago Traction Co.*, 207 U. S., 20, and brief for appellee, by William W. Gurley, pages 61, 62, quoting from 196 U. S., 607, 609.

In the *Kentucky Railroad Tax Cases*, 115 U. S., 321, 337 (1885), Mr. Justice Matthews said in delivering the opinion of the court:

> "The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

In the present case the same methods have not been applied impartially to all the constituents of the class of railroad companies. One scale of values has been applied to every railroad in Kentucky except the C. & O. S. W. R. R. Co., for the years in question, while a different and much higher scale of values, a scale used not for the purpose of assessing, but for the purpose of frightening the railroad companies into a settlement, has been used against that company and enforced against this complainant. The Board of Assessors never completed their assessment by making a record but deliberately refrained from the necessary step which would have completed an assessment, keeping their memoranda "in a fluid condition" ready for a settlement to be made, and an assessment to be adjusted thereto, and then entered of record in the book kept for the purpose. We insist that the failure to use the same scale of values as applied to the C. & O. S. W. R. R. Co. that

was applied to the other railroads of the State, and the failure to use the same method in ascertaining the tax, the tax being shown in one case by the record book and the alleged tax being shown in the other case only by loose memoranda, the authorship of which is unknown, constitute a deprival of the equal protection of the laws. All the members of the class must be treated alike.

In order to make clear the situation under which the present proceeding arose, the following quotation is made from the opinion of the Court of Appeals of Kentucky in the case of *Southern Railway* v. *Coulter*, 113 Ky., 657, 665 (1902) (italics ours):

> "It appears from the record that for a few years after the adoption of the Constitution of 1891, and the enactment of the law requiring railroads to pay a franchise tax, the State Board of Valuation and Assessment, which has all the time been composed of the Auditor, Secretary of State and Treasurer, made no valuation or assessment of such franchise; but commencing with the year 1896 the said board required the reports mentioned in the statute to be made, and proceeded to value as prescribed by law the franchise of the several railroads. Those reports seem to have been made, perhaps, in different years; but all may be said to cover the franchise upon which taxes should be assessed and collected, commencing with the year 1896. The assessment, however, was not made until perhaps as late as 1898 as to some, if not all, of the roads. After the value of the franchise was found by said board, after consideration of the reports made, *the tax due the State was duly assessed and paid by the roads;* but no assessment or certification of the value of the franchise was certified to any county, city or taxing district."

The following quotation is made from page 678 of the report:

> "It is claimed on behalf of the appellant Illinois Central Railroad that, as it did not get possession of the entire lines until some time in 1897, no franchise tax should be assessed against it prior thereto. The record, however, discloses the fact that it made reports to Auditor Stone, and upon these reports he fixed the value of its franchises, commencing with the year 1896, up to the same time the other assessments were made. We are therefore of the opinion that as they recognized themselves as owners of the line at that time, and made their reports and paid taxes to the State, it is now too late to raise that question. We are not inclined to hold that appellants necessarily bound themselves to pay the county franchise tax simply because they paid the State a franchise tax. Neither have they any right to complain of the delay in enforcing the local taxes. They have simply had the use of the money without interest during these many years."

In the opinion of the Court of Appeals responsive to our claim of protection under the Fourteenth Amendment it is said:

> "All other tax-payers than railroads were taxed, and if some railroads escaped, it is no reason that others should go free, while all tax-payers of other classes paid their taxes."

We desire to raise an issue squarely upon this point. The right of the State to classify for purposes of taxation is unquestioned, but after the State has classified, the members of a class must be treated alike, and it is no answer to a tax-payer treated differently from others in its class that tax-payers of other classes were taxed and paid their taxes. The

Illinois Company has a right to insist that the basis of franchise taxation upon which it is required to pay shall not be different in this case from that of other corporations paying franchise taxes, and that when it showed that it was taxed upon a basis different from all other corporations in its class, it was no answer to say that private individuals who were taxed upon their cows and horses the same year have paid their taxes.

To illustrate, if the Illinois Company is bound to pay the franchise tax of the Chesapeake Company, it has the right that the franchise of the Chesapeake Company should be assessed by the same method and upon the same basis as other franchise taxes upon railroads for the same year. As pointed out elsewhere in this brief, the basis upon which the supposed assessment of the franchise of the Chesapeake Company was made is enormously higher than that made upon other companies.

An inspection of the evidence of Stone (p. 36) and of Laffoon (p. 42) in connection with the record, which is the book in which assessments were entered, shows that what the board did in case of the Chesapeake Company was not to assess but to threaten assessments. As stated by Stone:

> "We made a tentative assessment against the railroads, and at the end of thirty days we sent out notice of final assessment on a very much larger valuation than was afterwards fixed."

The State deliberately refrained from making a record of the transaction in order that the transaction might be inchoate only; that is to say, no assessment at all, and that the State should be in posi-

tion to negotiate with the railroad companies. The State enjoyed the advantage of negotiating without being bound by any assessment and finally fixed assessments upon the basis of a considerable reduction from the original tentative assessments (Rec., 37) *except in case of the New Orleans Company, where the State made and took advantage of an increase.* Now the State comes forward and claims that the so-called tentative assessments, which not being entered of record were never assessments at all, were real assessments, and must also be paid in addition to the assessments finally fixed, but be paid only in the one instance of the assessment of the Chesapeake, Company.

While it is, of course, true that one railroad company's escaping taxation does not prevent holding all others liable, still all the others escaping does so, because it causes one to bear the entire burden of taxation belonging to a class. Likewise, to permit a large number to escape makes a denial of the equal protection of the laws. One, or a few, always escapes and the scheme of taxation adopted is, nevertheless, substantially carried out, but to permit virtually all to escape, or all but a few to escape destroys equality of taxation and the equal protection of the laws. This results from the principle established in *Raymond* v. *Traction Co.*, 207 U. S., 20.

Nor are the Commonwealth's contentions assisted by saying that "if any railroads escaped they are still liable for their taxes unless barred by limitation" (*Opin.*, Rec., 79) because the Commonwealth *has no intention of holding, nor had it ever such in-*

tention, (nor, indeed, any *data* or envelope *memoranda* upon which to hold them, so far as known), having in 1899 already finally assessed them for the four years, 1896, 1897, 1898 and 1899 and collected the taxes therefor; Stone said, as aforesaid (Rec., 49):

> "In this assessment, the second assessment in 1899, we made, as I stated, a considerable reduction from the original assessment, and, in the matter of the Illinois Central Railroad Company, we agreed not to assess the C. O. & S. W. for the first two years, we agreed that,—in other words, that the amount we assessed against the Illinois Central should be in full for all the properties they controlled for four years, this assessment, and the one sent out as final in 1898 we reconsidered and declined to assess any franchise tax against that road for one or two years, for the first years,—two years, I think. In other words, the agreement of the board was to reconsider these assessments entirely, and take them back, in consideration of the fact that the road would pay the next two assessments on the basis agreed upon. When I went out of office, we considered that the entire railroad assessment of the State had been settled for those four years, and that we had passed on it amply, as best we could."

The Commonwealth's position, as thus shown by Stone, manifests that it has attempted to coerce payment from a single railroad corporation of taxes which no other railroad company is expected to pay, or ever will pay, taxing the former by a more burdensome method, and thereby the former is denied the equal protection of the laws.

Our point is simply that the only assessments which ever were in fact made were those which were entered of record in the book kept for that purpose, and that these memoranda, if such they were, were not assessments at all. The so-called "tentative assessments" and the "final assessments" which were actually paid cannot both be assessments. All the railroads of Kentucky have paid upon the basis of the so-called "final assessment," but now an effort is made to make the Illinois Company pay also on the basis of the "tentative assessment," in addition to paying the other, and this exception is made in the case of only one railroad, the Chesapeake Company's property. If all the railroads in Kentucky are taxed upon the basis of the so-called "final assessment," while the Illinois Company alone is also assessed upon the basis of the so-called "tentative assessment," the Illinois Company is denied the equal protection of the laws.

Responsive to our opponent's contention that plaintiff's pleadings do not show the discrimination above complained, it sufficeth to say that the State Court treated the defense as raised, and actually considered and decided (Rec., 79) the question arising out of it.

No assessment ever made.

If the judgment here for review does not violate the requirement of due process, then that requirement is of little substantial value, as appears from the STATEMENT. Railroad property in Kentucky had been assessed by the Railroad Commission exclusively prior to 1899 (Railroad Tax Cases, 115 U. S.,

321; *Railway* v. *Coulter,* 113 Ky., 657, 665; *Opin.,* Rec., 58), and the Board of Val. & Assess., threatening franchise assessment in January and February, 1898, never intended to effect an assessment by the *memoranda* endorsed on the envelopes in question (Rec., 53, Q. 28) and all taxes really assessed against the lines operated by plaintiff in error or any of them, and against all other railroad companies in Kentucky, were paid when assessed in 1899 retrospectively for 1896, 7, 8, and 9 (Rec., 49). Stone says:

> "When I went out of office, we considered that the entire railroad assessment of the State had been settled for those four years, and that we had passed on it amply, as best we could."

The claim of the Commonwealth, therefore, made after Stone's Board went out of office, based upon the unsigned *memoranda* endorsed, and in an unproved handwriting, upon the envelopes used to hold the reports, but which were never carried into a record, was a baseless and inexcusable claim. The State Court seems to have never grasped the facts, for its misapprehension of them is manifested throughout its opinion; *e. g.* (Rec., 58, 60), it declares that the Illinois Co. was held for 1897 taxes, but not for 1896 taxes, because it was in possession and made the report in the former but not in the latter year and, nevertheless, considered there was no hardship upon the company in being made liable for 1897 taxes because it escaped the taxes for 1896, when, upon the court's hypothesis, it was no more liable for 1896 taxes than for any previous year.

Again, the State Court, affirming the trial court's

judgment, said that the latter court had but followed the decision in *Ry.* v. *Coulter,* 113 Ky., 657, holding the Illinois Co. liable because it made the franchise report and had "in some way not explained in the record come into possession of the railroad" (Rec., 58), when although the Coulter record did not show this, the record in the instant case did show that the Illinois Co. was in possession as agent or attorney in fact under power of attorney from Harriman (Rec., 8, 58).

Again, the State Court thought that the assessment now combatted by the Illinois Co. had been adjudged valid in *Ry.* v. *Coulter,* for it says that in that case "the Illinois Central was held liable *on this same assessment* in a well considered opinion by this court" (italics ours), when the truth is that the assessment discussed in *Ry.* v. *Coulter* was the 1899 assessment, *the real assessment,* which was paid by all the railroads, and which superseded the threatened assessment of 1898, *which was abandoned.* Upon the assessment in *Ry.* v. *Coulter,* the *State taxes were paid,* and the only question litigated was the liability of the railroad companies to pay county taxes upon the assessment. The State Court, therefore, is in this dilemma, to-wit: if the franchise assessment now claimed were the *"same assessment"* adjudicated in *Ry.* v. *Coulter,* then it has been paid;—if not, then the Coulter case lends the State Court no support. The Coulter case acts upon, and assumes the correctness of, the 1899 assessment.

Our opponent (Brief, 8) claims that the report

filed by the Illinois Co., *Agent*, September 15, 1896, manifested that the total capital of the Chesapeake Co. was $6,700,000, its tangible property $4,753,339, etc., as endorsed on the envelope enclosing the report, but he has evidently mistaken the endorsement itself for the report. See Rec., 24½.

The foregoing observations upon the State Court's opinion will dispel any misapprehension arising therefrom that the taxes claimed in this case were really due from anyone; but were the truth otherwise the judgment, nevertheless, would deny the Illinois Co., plaintiff in error, *due process* and *the equal protection of the laws*, for that company was never accorded a trial of the question of its personal liability for taxes; it was held liable when every other railroad company in Kentucky went free and was, therefore, taxed by a different and more burdensome method than the others; and it was adjudged to pay taxes never assessed although assessment is the first element of due process in *ad valorem* taxation.

As hereinafter shown, an assessment is the first element of due process in tax proceedings. Taxation is taking property *in invitum*. It is an exercise of sovereignty. It involves the power to destroy. *It must, therefore, be according to due process.*

Taxation implies equality of exaction, and the ascertainment of the individual burden implies the necessity of assessment. This is established by the authorities hereinafter reviewed.

Plaintiff in error, the Illinois Co., was not assessed by the jacket *memoranda* relied on for the amount sued for, and it is not claimed that there was any

assessment against it, or any record of such an assessment. The whole claim is that the *memoranda* endorsed upon the jacket (Rec., 24½) constituted the record of an assessment of the *Chesapeake Co.*

A similar claim upon similar memoranda (Rec., 10½) was denied for the year 1896 (Rec., 58), upon the ground that the Illinois Co. was not in possession September 15, 1895.

The *memoranda* endorsed upon the envelopes referred solely to the Chesapeake Co. and did not mention the Illinois Co. The endorsement was "Chesapeake, Ohio & South Western R. R. Co., Louisville, Ky." The figures in the jacket *memoranda* followed immediately. (Rec., 24½.)

An assessment against the Illinois Co. could not, therefore, be tortured out of the endorsement upon the envelope, and, of course, there was no basis for a personal liability of the Illinois Co. whether in possession of the railroad or not.

Indeed, any claim of assessment of the Illinois Co. would be refuted by the Commonwealth's pleadings, for in its original petition it claimed an assessment against the Chesapeake Co. only and asserted the Illinois Co.'s liability *upon the sole ground that it had somehow gotten the railroad and "as a partial consideration for said acquisition covenanted to pay to the Commonwealth all taxes accrued or accruing for which the said Chesapeake, Ohio & South Western Railroad Company was or was to be liable,"* etc. (Rec., 3) (italics ours); and in its amended petition it withdraws its original allegations concerning the Illinois Co. and claims the liability of the *property*

of the Chesapeake Co. only, and asserts no personal liability of the Illinois Co. (Rec., 6, 7.) It, accordingly, appears not only that the Illinois Co. was never assessed, but that the Commonwealth did not claim that it was.

There was no assessment, however, against any one. The jacket *memoranda* were simply *memoranda* for the Board's convenience (Stone, 53). *It does not appear who made the memoranda, nor for what purpose.* Whether they were *memoranda* of the amount upon which the Board had settled as a proper assessment of the C. O. & S. W. franchise, or were simply *memoranda* of the amount to be threatened in order to beget conferences with the railroad company in order to reach a just conclusion, or were simply made by some clerk for future consideration of the State Auditor or of the Board, does not appear. That they were not treated by the Auditor or Board as an assessment, nor intended to be such, is proved by the uncontradicted testimony of Auditor Stone, and by the Board's actions in abandoning them and making the 1899 assessment which was different and paid and both could not stand.

Assuming, therefore, that Stone's testimony would be incompetent to contradict *the record* of an assessment, and that the Corporation Tax Book (Rec., 53) is not susceptible of contradiction by parol, no such verity can be claimed for *memoranda* endorsed upon jackets or envelopes which are not records (see 1 Cooley, Tax., 576 [3rd Ed., 1903]). Unless a record has been produced the plaintiff in error has been denied due process of law.

The *memoranda* upon the envelopes do not profess to be an assessment. They have none of the attributes of an assessment. It is shown in this record that the real assessments against all the railroads in the State were made a year later, 1899, and *recorded* in the tax-book entitled, "REPORTS OF CORPORATION FRANCHISES, MISCELLANEOUS AND RAILROADS" (Rec., 53A.) To permit the Auditor, who was Chairman of the Board, therefore, to testify that the endorsements upon the envelopes holding the tax reports were not records, and never intended as records, and that the assessment now deduced therefrom by the State Court was never intended as an assessment does not contradict any *record*, as might be inferred from the language of the State Court.

A record must have permanency. The *memoranda* endorsed upon envelopes have none. The envelopes wear out. They are subject to friction in being handled, and to dust, and are not meant to be preserved. When one envelope is worn out, another replaces it. *Memoranda* upon such envelopes have no permanency, but are presumably in a mere fluid state. Their purpose depends upon the secret intentions of the person making them, whether Chairman of the Board, a member of the Board, or a clerk or accountant. Such *memoranda* may indicate amounts suggested for assessment, but not settled upon. They may indicate amounts to be threatened, and amounts so large as to terrorize the railroad companies, for Stone testifies (Rec., 48) that assessments were threatened against the railroads of the State but were all aban-

doned (Rec., 49) and new assessments made which were paid by all the railroads, including plaintiff in error (Rec., 48).

Permanency is essential to a tax record because such record is the foundation of title, and a tax record book contains the record of many titles and concerns many citizens, but an envelope enclosing a paper is worn out through usage and discarded, and replaced, *ad libitum*. It has, therefore, no semblance to a record.

Not only is permanency essential to the conception of a record, but "every essential proceeding in the course of the levy of taxes must appear in some written and permanent form in the records of the bodies authorized to act upon them. Such a thing as a parol levy of taxes is not legally possible under our laws." *Moses* v. *White*, 29 Mich., 59, 60 (1874), opinion by Campbell, C. J., concurring Cooley and Graves.

The necessity of a record to the validity of a tax is well understood. In 1 Cooley on Taxation, 576 (3rd edition, 1903), it is said:

> "In every case of the levy of taxes, whether they be voted by representative bodies or by the people, it is requisite that the action which authorizes the levy or determines anything of importance concerning it should appear of record. This is very justly and properly insisted upon in the decisions of courts. 'Every essential proceeding in the course of a levy of taxes,' it is said in one case, 'must appear in some written and permanent form in the record of the bodies authorized to act upon them. Such a thing as a parol levy of taxes is not legally possible under

> the law.' And in another, in which the action of a convention of town delegates in voting a county tax was in question, 'a record of the doings of such a convention is the only evidence to show a county tax duly granted.' The importance of the record is seen in the fact that it is intended by the law not only for evidence but for the only evidence of the action taken; and that when properly made up its recitals are conclusive; evidence to disprove them not being receivable. The records ought to be duly authenticated on their face by the officers who make them, though if they have beep kept in the proper custody and are identified beyond question this is probably not essential. If the record is lost or destroyed, its contents are subject to parol proof as in other cases, after the necessary preliminary showing has been made. But in the absence of evidence that a record ever existed, the fact cannot be made out by presuming it."

The necessity of an assessment as the initial step in due process is shown in our petition for rehearing (Rec., 68).

Cooley says, Vol. I, Taxes, 3d Ed., p. 597:

> "An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities. The assessment is, therefore, the most important of all the proceedings in taxation, and the provisions to insure its accomplishing its office are commonly very full and particular."

The State can not maintain an action for taxes until a valid assessment against property has been made (*Clegg* v. *State*, 42 Tex., 610).

"An assessment is, in the broadest sense, a juris-

dictional requirement" (*Roberts* v. *First National Bank,* 8 N. D., 504). An assessment is essential to liability for an *ad valorem* tax, and the Legislature can not authorize assessment *in a proceeding to recover taxes* (*State* v. *C. & D. R. Co.,* 54 S. C., 564). See also 104 Pa. St., 89; *Wells* v. *McHenry,* 7 N. D., 246.

This defect of jurisdiction can not be remedied by curative statute (*McReynolds* v. *Longenberger,* 57 Pa. St., 13). In *Flannagan* v. *Dunne,* 105 Fed. R., 828, it was held by the United States Circuit Court of Appeals that the purchaser at a tax sale acquired no title against a purchaser at a foreclosure sale where the property was assessed to a mortgagee instead of the mortgagor, who was the owner. In its opinion the court decided the assessor's action in assessing the property to the mortgagee, who returned it for assessment, to be unlawful, and that all proceedings based thereon were void, saying, "All proceedings on a void assessment are void." Probably no court has declared more unequivocally the indispensability of the assessment as the initial step in due process in tax proceedings than the Kentucky court.

In *Slaughter* v. *City,* 89 Ky., 112, 121, *et seq.,* our court said (page 122):

> "In the nature of the thing, there must be an assessment. On this subject Cooley, in his work on Taxation, 1st Ed., page 259, says: 'Of the necessity of an assessment, no question can be made. Taxes by valuation can not be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which will

> follow it. Without an assessment they have no support and are nullities. It is, therefore, not only indispensable, but, in making it the provisions of the statute under which it is to be made, must be observed with particularity.' "

Denying the Legislature's constitutional power to assess, the Kentucky Court says (page 123):

> "When they are imposed by authority they operate on the taxpayer *'in invitum.'* When they take the form of a percentum, there must be a valuation as a basis of the power to levy and collect them. The taxpayer is entitled to be heard in fixing this valuation. The basis of the right to collect taxes from him consists in the valuation of his property; and to deny him the right to be heard in making this valuation would be the taking of his property without due process of law. The valuation is the due process of law by which the right to take his property for taxes is begun; and the Legislature, having no judicial, executive or ministerial power, can not make the valuation; but the valuation must be made by some person authorized to exercise in this State ministerial power, and such person is the assessor."

See *Powers* v. *Fuller*, 30 Iowa, 476, 477.

The *Slaughter case* has been cited and followed in Kentucky in *Cassidy* v. *Young*, 92 Ky., 227, 232. *Turner* v. *Pewee Valley*, 100 Ky., 288, 291; *Pratt* v. *Breckinridge*, 112 Ky., 15.

In *Turner* v. *Pewee Valley, supra*, a town had enacted an ordinance adopting the State Assessor's assessment of real estate in the town and levying a tax upon the property thus assessed, and the town's action was condemned as a nullity. The court (page 292) said:

> "We are compelled to hold that the pretended

assessment of appellants' property in the mode and manner shown in these cases is void. Every tax is an involuntary charge on the taxpayer, although in some instances a community may desire and vote a tax on themselves, yet there are always some who object to being taxed, and as to those who do object it must be an involuntary charge.

The imposition of such involuntary charges of taxes on citizens is the exercise of sovereign power, and so closely is the exercise of that power guarded by constitutional provisions and by the adjudications of the courts that require a strict observance of the law under which such taxes are to be imposed. As said by Judge Cooley on Taxation: 'The assessment being so important, provision respecting its preparation and contents ought to be observed with particularity. * * * The assessment must, therefore, be made by the proper officer or it will be void. * * * So the assessment will be void if the assessor commits the office of making it to a clerk.' (Cooley on Taxation, pages 363-4.)

The board of trustees, by requiring the assessor of the town to adopt the assessment made by the assessor of Oldham County, not only prevented him from making an assessment himself, but required the assessor to procure an assessment made by one who was not a citizen of the town, and who had no common interest with those who were expected to pay the tax. They failed to require even a report to the board for its approval, but directed the assessor to make out the list and give it to the sheriff for collection by these ordinances. No provision was made for the taxpayer to be heard, nor was he given any notice or opportunity to be heard and correct said list.

This question is not new to this court. Similar questions were decided in the case of *Slaughter* v. *City of Louisville*, 89 Ky., 112; *Davidson* v. *Sterrett*, 13 Ky. Law Rep., 176."

Turner v. *Pewee Valley* has been reviewed in *Alexander* v. *Aud*, 120 Ky., 105, and *Wildharber* v. *Lunkenheimer*, 128 Ky., 344, 349, but its sanction on the point in question has never been doubted.

This court considered the nature of an assessment for taxes and approved the doctrine of Cooley, Tax., 258, 259 (100 U. S., 539, 545), and this court's language was quoted and applied in *State* v. *C. & D. R. Co.*, 54 S. C., 564, s. c. 32, S. E. Rep., 691.

Assuming, then, what is incontrovertible, that an assessment is indispensable to tax liability, it results that no such liability has been imposed on the Illinois Co. pursuant to the requirements of due process of law.

It is likewise true that due process was equally lacking in the attempt to impose tax liability upon the Chesapeake Co. What we have heretofore said upon the board's action is applicable here.

The State Court begs the question when it says "When the board made an assessment and sent out the preliminary and final notices," etc., "its action was final," for the board "made" no "assessment." The only basis for claiming an assessment is the fluid *memoranda* endorsed upon the envelopes; and we have seen that these constitute no record of an assessment; and Stone, chairman of the board, has testified (Rec., 51, A. 28), and is uncontradicted, that the *memoranda* were never intended as an assessment.

Assuming that the notices mentioned were sent to somebody, presumably the Chesapeake Co. as the report in question was its report, nevertheless, notices constitute no assessment. *Resolutions* of the

board *entered upon record* constitute an assessment, and the notices simply give information of the assessment. The State Court, therefore, overlooks the absence of the most vital step in the tax proceeding, *viz.*, the assessment itself which, as aforesaid, must be of record.

The fallacy of treating the endorsed *memoranda* as records is demonstrated in this case by the circumstances that there were two envelopes which held each report, and each envelope bore *memoranda* suggestive of the amount to be assessed, and they differed. (Stone, Rec., 11, 25, Statement, *Supra.*) The old envelope was trimmed and thrust inside the new, but if the latter constituted an assessment, why retain the former? The obvious answer is that the *memoranda* were simply retained for future consideration in fixing the assessment, and neither were intended to constitute an assessment.

Liability for taxation must be based upon matter of record. It cannot rest in parol; it cannot depend upon memoranda of uncertain origin and significance endorsed upon fleeting papers. If a person can be compelled to pay thousands of dollars for taxes alleged to have become due many years before by the production of figures of unknown origin upon an old envelope found in a State office, the constitutional guaranty of due process of law is worthless. Such entries could be changed over and over again without responsibility. To alter them would not be forgery. Each man would be at the mercy of tax ferrets and find himself confronted with enormous demands proceeding from irresponsible sources and of such a nature that he would be helpless to defend himself.

On the other hand a record is protected from alteration by the criminal law. The risk of alteration is slight because it is of a permanent character; the responsibility of making entries upon it is serious. The taxpayer can determine by inspection the obligation with which he is charged. He can determine it at the time the obligation accrues. His rights are as definite and determined as in case of a judgment of a court. The Board of Assessment felt in this case the importance of a record. They deliberately refrained from making a record in order that liability might not be fixed or ascertained against the railroad companies for the amounts for which they sent out their first notices,—indeed, they never made up their record until after the negotiations with the railroad companies were over, the amount of liability fixed after conference and the resulting assessments had been paid. This was the behavior of the diplomat rather than of the tax assessor, but it shows that the assessing body itself understood that there was no assessment until a record entry had been made determining the liability. The Illinois Company has paid its franchise tax for the years in question and it insists that it cannot be compelled to make a further payment upon the flimsy basis of the figures upon an old envelope produced after a lapse of years and under circumstances in which it is practically impossible to ascertain the facts or properly defend against the alleged liability. If a tax liability can be established upon such a basis as this the fortunes of all men are in jeopardy.

In the case of *Western Union Telegraph Co.* v. *Howe,* decided by the Circuit Court of Appeals for

the Eighth Circuit, April 27, 1910, 180 Fed., 44, 52, the opinion of the court defines "assessment" as "the official listing of property for the purpose of constituting a basis upon which taxes are to be levied." This definition implies the making of a record or official list without which there would be no assessment. A levy of taxes without such official listing or assessment would necessarily be without due process of law.

In the case of *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock,* 204 U. S., 585, 593, where the question arose of the propriety of the valuation made by a State Assessing Board, speaking through Mr. Justice Holmes, the court said:

> "This board necessarily kept, and evidently was expected by the statutes to keep, a record. That was the best evidence, at least, of its decisions and acts."

We say here that since this board was charged with the assessment of taxes upon a basis of value from the very fact it was an assessing body it was necessarily bound to keep a record and only upon the basis of a record could the defendant be subjected to liability.

Where a tax is levied on property in proportion to its value as determined by a Board of Assessors, Due process of Law requires that there be a Listing of the property and its valuation as assessed upon a public record.

There are two lines of cases which might at first glance appear to be in point and which must be carefully distinguished.

1. First there are many cases in both State and

Federal Courts where a tax has been held invalid because of some defect in the assessment record. But these cases are, so far as we have been able to examine them, invariably decided on the ground that the state law requires an assessment roll, and that since the law has not been exactly complied with the tax is void.

2. The second line of cases which must be distinguished carefully are those cases where no assessment is required at all. In these cases the tax law itself creates the liability on the individual owner without the intervention of any assessing officer. But these methods of taxation are and it is believed can be applied only to those forms of property which have a fixed money value and where the amount of tax due will not depend on a valuation based on the judgment of an assessing board.

The official record of an assessment is usually termed in text books and cases the assessment roll. It contains ordinarily, among other things, a description of the taxable property, the amount of tax, the names of the owners and the value of the property. It is essential to the validity of an assessment that a proper roll or list should be made in accordance with statutory provisions. These provisions being for the protection of the tax-payer are mandatory.

Allen v. *McKay,* 139 Calif., 94.
Thurston v. *Little,* 3 Mass., 429.
People v. *Hagadorn,* 104 N. Y., 516.
State v. *Wabash Ry.,* 114 Mo., 1.
Kelly v. *Herrell,* 20 Fed., 364, 369.

In *State* v. *The Wabash Ry. Co.* (114 Mo., 1), the action was to enforce a lien of state for taxes claimed to be due. The roll assessed taxes on "a certain tract of land except that part thereof returned to and assessed by the State Board of Equalization." It was objected that the description on the record was too vague, and the court sustained the railway company. It said:

> "A valid assessment has invariably been held an essential prerequisite to the lawful exercise of the power of taxation," and later, "An accurate description is necessary to a valid assessment and the assessment is the basis of the tax. * * *
>
> We think the court most clearly erred in admitting parol evidence to supply a description of this property and to make that description the basis of its action and judgment. The assessment is at the basis of the tax. If the assessment is void the tax is void. *Assessment* is from its *legal requirement,* and the necessity of preserving its evidence, a written entry, and must depend on the assessment rolls, as returned by the assessor and approved by the court."

It is clear that the court would not have tolerated an assessment without a record.

In *Perkins* v. *Longmaid,* 36 N. Hamp., 507, the court say:

> "The making of this record of the tax constitutes the assessment. The invoice may be taken, the mathematical computation is made, and a tabular statement prepared, showing the amount of the tax to be assessed against each taxpayer, and thus all the preliminary proceedings completed for assessing the tax, and still the assessment be left incomplete, because the record which is the *essence* of *the assessment,* has not

been made as the *record* of *it.* * * * Without them (the preliminary proceedings) the assessors would not have the means to make the assessment; but *they* are *not the assessment,* nor *properly considered* any part of the *assessment.*"

Thurston v. *Little,* 3 Mass., 429, an early Massachusetts case, has a very clear discussion of the proposition that an assessment roll is requisite to a valid tax. The plaintiff sued in trespass and the defendants justified as assessors. This record on which the validity of the tax depended was a book, in which was entered the plaintiff's name and the amount, $15.68, set against it, as the tax on his poll and estate. The court observed first the statute which expressly required "the assessors to make and lodge in the clerk's office, or in their own, an invoice or valuation, from which the rates or assessment shall have been made, together with an exact copy of the assessment." The court held the record insufficient, saying (page 433):

> "To receive this as evidence of a compliance with the statute, would be to render null and void all its beneficial intentions in this regard, and to preclude all remedy against the carelessness or corruption of assessors."

On page 433, the court also says:

> "This value (of property) can only be ascertained for purpose of assessment, from the returns to be made by the persons liable to taxation, and, in case of their failure or neglect, by an estimate to be made by the assessors. * * * In whichever of these modes the result is obtained, it is equally required by law that a list and valuation of each individual's taxable property be made and preserved for the inspection of all interested in the assessment. This furnishes a considerable check to the assessors, and affords

a protection to the citizens against prejudice, partiality or inattention."

It would be possible to quote several other State cases where a State tax has been held void for lack of a correctly made "assessment roll." Attention is drawn particularly to the idea that is constantly expressed by the judges that the listing of the property on the assessment roll is not a mere failure to record a legal act—in itself complete—but the listing is a part of the assessment. It may be affirmed that if an assessment is considered a part of due process in taxation, the listing which is a part of the assessment is also essential, apart from the direction of statute.

For example, the Supreme Court, in *People* v. *Weaver*, 100 U. S., 545, adopt the language of Justice Cooley:

> "This (an assessment) is always requisite where the taxes are to be levied in proportion to an estimate either of values of benefits or the results of business. An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists in the two processes—*listing* the persons, property, etc., to be taxed, and, of estimating the sums which are to be the guide in an apportionment of the tax between them. (Cooley Taxation, p. 258.)"

Judge Cooley clearly states that the listing of the property is not the mere making of permanent evidence of an assessment, but the making of the record constitutes the assessment itself. It follows from

this that if an assessment be a part of due process of law guaranteed by the Constitution the making of the assessment roll, which is the final act of assessment cannot be dispensed with. Do away with the assessment roll, and the Constitutional guaranty becomes of no value at all.

There is a second line of cases which must be considered because they seem to contradict the rule we are seeking to establish in this case. These are cases where no assessment, properly speaking, is provided for at all. The law simply declares that the tax shall be paid, and if it is shown by the State officers that the defendant owned the kind of property taxed, there is recognized an obligation to pay. Here obviously there is no "listing on a public record," nor any other act by a governmental body, which constitutes an assessment as that word has been hitherto defined. But these cases can all be distinguished by observing the line which separates property, which needs no determination of its value as a preliminary to an owner's obligation to pay a certain tax thereon, and property whose nature renders necessary such a valuation. In case of the former class of property no assessment is required by the "due process of law" clause—because it is not indispensable from the nature of the property and the kind of tax.

Such a case was presented to the Supreme Court in *Savings Bank* v. *U. S.*, 86 U. S., 241, where a state tax was levied on the surplus deposits in a savings bank. It is obvious that the bank could from the statute itself determine just what its tax would be, and the Supreme Court held that the obligation to

pay arose from the statute itself, no assessment being required. But this case is instructive for us in that it provoked a division in the ranks of the court and gave Mr. Justice Bradley occasion to point out in his dissenting opinion the very dangers which have been exemplified in our own case. He says (p. 241):

> "I dissent from the judgment of this court on the ground that an action will not lie for a tax of the kind in question in this case unless it be first entered on the assessment roll. The assessment roll should be regarded as conclusive as to the persons or things liable to taxation. If it is not, if the matter is left open so that any person or corporation may be prosecuted for taxes at any time, it leaves the citizen exposed to many hazards and to the mercy of prying informers, when the evidence by which he could have shown his immunity or exemption has perished. * * * It seems to me that the decision introduces a new principle into the system of taxation dangerous to the rights of the citizens and the peace and security of society."

The point is that where an assessment is necessary a record must be made; where the amount of the tax due can be ascertained from the law itself by the tax-payer, no record is necessary.

To recapitulate: The following propositions can be established as a matter of principle; and on such authority as covers these questions.

I. Where a tax is levied on property in proportion to its value as determined by a board of assessors, due process of law requires that there be a listing of the property and its valuation as fixed, upon a public record.

II. Such a public record is required not as "bet-

ter evidence" of an assessment but because the making of the list or record is an essential part of the assessment.

The tax levied in this case was on a franchise as property in proportion to its value, and it was distinctly provided that that value should be ascertained by the "Board of Assessment"; it was absolutely essential that its value for purposes of taxation should be determined by some one previous to any liability on the railroad to pay.

The failure of the assessing board to enter these valuations as a matter of public record in the usual manner, constituted a failure in the assessment and the tax was void for lack of due process of law.

What is a Record?

The following quotation is made from 34 Cyc., 585 (1910), article "Records":

> "The term 'record' is ordinarily applied to public records only, in which sense a record is a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said, or done. To constitute a public record there must be at least these elements, namely, that it must be a written memorial, must be made by a public officer, and that officer must be authorized by law to make it; but the authority of the officer need not be derived from express statutory enactment, and if authorized to make it it is not necessary that he should be required to do so; and a written memorial of a transaction in his office when made by a public officer becomes a public record belonging to the office and not his

private property. Records may be either of legislative or judicial acts, and whether a given instrument is a public record is a question of law for the determination of the court."

The following extract is made from the note accompanying this passage:

"Other defintions are: 'A written account of some act, transaction, or instrument, drawn up, under authority of law, by a proper officer, and designed to remain as a memorial or permanent evidence of the matters to which it relates.' Black. L. Dict. * * *

'A memorial or remembrance; an authentic testimony in writing contained in rolls of parchment, and preserved in a court of record.' Wharton L. Lex (*quoted* in *Reg.* v. *Sparrow*, 12 N. Brunsw., 237, 239).

'Record, in its broadest sense, is a memorial, public or private, of what has been done. It is ordinarily applied to public records only, in which sense it is a written memorial made by a public officer, judicial, legislative or executive, authorized by law to perform that function, and intended to serve as evidence of something written, said or done.' Cyclopedic L. Dict."

In 24 A. & E. Enc. of L., page 172, the author says:

"Books relating to taxes and tax sales should also be considered as public records, as, for example, tax assessors' or selectmen's books containing assessment of taxes, the book of the collector of internal revenue, containing the record of the names of persons paying special taxes, tax lists required by statute to be filed in the office of the county clerk, etc. * * *"

The following definition is taken from the Century Dictionary:

"Public records, official entries of facts, transactions, or documents, made by public officers

pursuant to law, for the purpose of affording public notice or preserving a public memorial or continuing evidence thereof."

In the case of *State* v. *Anderson,* 30 La. Ann., 557, 567 (1878), a prosecution for forgery, the court said:

"A public record is a written instrument, made by a public officer as directed by law, to serve as a memorial and evidence of something written, said or done. Of necessity, the forms and verifications of these public instruments are prescribed by law. Evidence may be received to show that a paper having the form and appearance of a public record was or was not in fact what it purports to be, or to show its custody in a public office, or the like; but whether a given document possesses the form and character of a public record is to be determined by its conformity to the statute directing its confection, if it be a statutory instrument, or to the general law, if it be an ordinary legal instrument, and is from its nature a question of law."

In *Heintz et al.* v. *Thayer et al.,* 92 Tex. Supreme Ct. Rep., 658, 50 S. W., 929, the court said:

"We think it may be said that a 'record of an officer' is that which is made in the discharge of his official duties by doing an act that he is empowered by law to do. * * *

'The fixed characteristics' of a record are that it must be of and concerning a proceeding in court or within the official power of an officer, and that it must be made under such conditions that the officer was authorized by law to act and to do the thing done, whereby it can alone become a record, within the meaning of the law."

The Entries on the Envelopes Not Records.

Assuming that it is established that an assessment list of some kind is essential to the validity of an

ad valorem tax, is the envelope or jacket, with the memorandum or other writings thereon, introduced by the State in the court below, a sufficient record to meet this requirement?

Cooley (Taxation, p. 789) says:

> "The subjects of taxation having been listed properly and a basis for apportionment established, nothing remains to fix a liability but to form the tax roll or tax book, by extending, either on the original assessment list, or upon a duplicate thereof, the several proportionate amounts as a charge against the several taxables, and not until then will a liability for any particular sum be fixed."

Again on page 600 Cooley says:

> "The assessment must be made by proper officers or it will be void."

If we accept the above as an authority, we can lay down with assurance the following requisites of an assessment list, independent of any statute:

(1) The assessment list must have been prepared by an officer or officers duly authorized.

(2) It must, if it be considered a part of the assessment, have been completed within the time designated for the making of the assessment, and the board by whom the assessment was to be made, must have been authorized to act at that time.

(3) It must have been prepared, as an assessment list, and have been intended as such by the board who authorized it.

(4) It must have some of the characteristics of an assessment roll. It must at least, to have any effect or meaning whatever, designate the property, the valuation, and the owner to be charged.

We find that it does not appear in evidence by whom this jacket was prepared.

It is a matter of record that the taxes sought to be collected were assessed for the year 1897; they were alleged to have been assessed by a board of assessment, duly authorized to act at that time. The record also shows that no record was kept of the proceedings of this board, by its secretary, and no connection is shown between the original transactions of the board, and the jacket memoranda, as introduced at the trial.

The case may be shortly stated thus: this tax is invalid because it was not made to appear that this Board of Assessment ever actually assessed the property now charged with the tax. As to how the acts of an official board should be proved, we present the case of *Pennsylvania R. R. Co.* v. *Montgomery Co. Pass. Ry. Co.*, 167 Pa., 62. This was a suit in equity to enjoin the construction by the defendant of an electric street railway on a certain public road outside of any city. The defendant relied on authority conferred by a township board. In discussing the power of a township board to authorize the building of such a railway along a country highway, the court said (31 Atl., 469):

> "How is the consent of the local authorities to be obtained in any given case, and what is the proper evidence that it has been given? The township books in the custody of the town clerk, are the records of the township, and should afford evidence of the action taken by the supervisors in all matters of public importance. A paper in the pocket of a contractor or of some officer of a corporation is not the proper evi-

dence of action by the township or the school district. The action needed is not that of the individuals who compose the board, but of the official body. * * * One supervisor may bind the township by an act that is ministerial in character (9 Pa. St., 272). Not so, however, when the act is one that requires deliberation and the exercise of judgment. In such cases the supervisors must be together, and their action must be taken in their official character, and should appear upon the township book kept by the town clerk. If not so taken it does not bind the township and has no validity whatever."

Upon the question whether a certain paper produced is sufficient evidence of an assessment, there are a considerable number of cases. It may be urged that these cases are of no value to prove that the writing produced here did not satisfy due process of law in taxation. These cases, however, are of some value, because they show the opinion of certain courts of last resort, that certain papers are not even sufficient as evidence of an assessment, hence could not in their opinion be sufficient as an assessment itself. The two questions though stated in a different phraseology are practically the same.

McReynolds v. *Longenberger*, 57 Pa., 13 (p. 27), involved the validity of a sale of land for taxes. Question was made of the regularity of the assessment, and the Supreme Court was called upon to decide whether an assessment had been shown.

"The book containing the list in which the L..... tract is found charged with the county taxes for these years, does not in any part express that it is the unseated land book of the county, nor that it is a transcript of the unseated lands furnished by the commissioners to the

> treasurer for those years. No warrant to the treasurer to sell accompanies the list. The list is not identified by intrinsic evidence as the work of the commissioners or their clerk; neither the names nor the handwriting of either are shown upon it. It seems to us, therefore, that in the absence of all evidence of identity, it was not competent for the court to declare it a list of unseated lands, showing a legal assessment of these taxes by the commissioners. * * *
>
> We are, therefore, of opinion that the court erred in treating the book in question, under the circumstances, as sufficient evidence of the assessment of the taxes for 1818 and 1819, and in receiving the deed for the land in question without proof of an assessment."

Practically the same question was presented in the two following cases, one from the Supreme Court of Minnesota and one from New Jersey. In both of them, the papers presented, though showing that an assessment had been intended, were held insufficient.

Howes v. *Gillett,* 23 Minn., 231, was an action to try the validity of a tax sale. The only evidence offered by the plaintiff of the assessment and levy of the tax, were the tax duplicates for the years for which taxes involved were claimed to be due. The court said the only question involved was whether a tax duplicate is *prima facie* evidence of the assesment and levy of a tax. The court said:

> "As an official document, a tax duplicate is proper evidence of its own existence and contents; but it is not evidence of a step in the tax proceedings anterior to itself, like the assessment and levy of taxes.
>
> The presumption that, in making it out and issuing it to the county treasurer, the county auditor did his duty, does not carry with it the

> presumption that the preliminary steps of assessment and levy were properly taken, since both of these steps are jurisdictional as respects the authority of the auditor to make out and issue the duplicate, and the existence of jurisdictional facts is not a matter of presumption."

In *Hopper* v. *Ex'rs. of Malleson et al.*, 16 N. J. Eq., 382, a question arose as to the validity of a tax sale. The evidence submitted of an assessment and levy on the property in question, was a single entry "1 H. & 1 L" in the assessment book under the alleged owner's name. This the court held to be insufficient evidence of an assessment on the piece of property sold. The court said:

> * * * "How did the fact appear to the mayor and aldermen that any such assessment was made? Certainly not by the assessment itself, which is the only competent and legal evidence of that fact. The recital or a warrant is not legal evidence of the fact of an assessment nor of demand of payment. There must be other and competent evidence that there was an assessment, and that it was legally made."

The essential idea of a record is that it must be made by one authorized by law to make it, either expressly or impliedly, that it must be intended as a memorial of official proceedings, and that it must be fairly contemporaneous with the matters to which it relates. Authority to assess a tax gives not only the power but imposes the duty to make a record of the transaction. Indeed, the record is the assessment and until the record is made the assessment has not been completed. It was not only the right but the duty of the assessors in the present instance to make a record of any assessment of the C. O. &

S. W. R. R. Co. if an assessment was intended. The memoranda which are brought forward to supply this deficiency are insufficient, first, because it does not appear that they were made by a person authorized to make them or who possessed any official authority in the premises. Their author is absolutely unknown. Secondly, it appears that the memoranda are of a fleeting nature, simply figures endorsed upon an envelope. If a liability as for taxes can be created upon such a basis as that which appears in the present suit, no person is safe from having to meet unexpected demands years after the means of protection have been lost, based upon irresponsible memoranda of uncertain date, doubtful origin and questionable significance.

As showing the character of the supposed record upon which liability is imposed, being the envelope a copy of which is printed opposite page 24 of the record, the attention of the court is called to the fact that this envelope states that the "corporation" was first notified *June 20, 1898*, and that final notice was *"Feb. 21—1898."* According to this document the final notice was the first notice given and the supposed record shows on its face a failure to comply with the law. There is no testimony in the record to correct the statement contained on this exhibit.

> "An assessment of land can not rest in parol, for a definite record evidencing official action is essential."
>
> 1 Cooley on Taxation, third edition, 601, note four, citing
>
> *"Sims* v. *Warren*, 68 Miss., 447; *Power* v. *Powdle*, 3 N. D., 107; *Sheets* v. *Paine* (N. D.), 86 N. W. Rep., 117. Property is not assessed,

> though on a verified list, until it is set down in an assessment roll, as required by the statute; *Oregon & W. M. Savings Bank* v. *Jordan,* 16 Or., 113. It is essential that property be entered for valuation on the proper roll, and that the location and valuation of the same should be shown: *Dykes* v. *Lockwood Mortg. Co.,* 57 Kan., 416."

In order for the property of a person to be taken from him for the purposes of taxation, a record showing that he has been assessed is just as necessary as a record showing that there was a tax to assess against him. In the present case there was no record of any kind showing an assessment. There were certain loose memoranda never entered of record and these memoranda showed not that the appellant was assessed, but the Chesapeake Co. We claim that due process of law required, first an assessment entered of record against some person, and secondly, that the entry of record should show that the person was assessed, against whom it is undertaken to collect the tax. In the nature of things the liability for taxes can not be made to depend upon memoranda on the back of old envelopes not intended as a record, never entered of record, subsequently changed and superseded by a record assessment, which was duly paid. Here we have a case where similar envelopes against other companies were thrown aside, where all taxes entered of record against the appellant were duly paid, and where by the discovery and use of old memoranda it is now sought to impose a personal liability for a tax upon property not owned by the appellant at the time at

which the tax was assessed and never assessed to appellant but to a third party, if assessed at all.

The practice which was indulged in by the assessors in this case of sending out notices of assessment for proposed assessments never entered of record in order to bring the railroad companies to come in and negotiate, later sending out a new set of assessment notices in a different sum in place of the former ones, making changes in these proposed assessments also and finally entering up assessments in the corporation franchise record, the only record ever made, can be considered due process of law, if at all, only in case of the assessments finally entered of record. These assessments the appellant paid. It is now sought to hold the appellant for additional taxes upon a proposed assessment made against another railroad company at a time when the property was not owned by the appellant, which proposed assessment was never entered of record. If anything would demonstrate the propriety, indeed the necessity, of holding that due process of law in cases of taxation requires that assessments should be entered of record, the present case would show the necessity of such a ruling. The appellant has been held personally liable as for a tax upon the basis of an old envelope upon which its name does not even appear, but the name of another corporation without any evidence who made the figures upon the back of these envelopes, the only evidence upon the subject being that the figures were mere tentative memoranda intended to be superseded by final assessments entered of record. It is also shown that there were assess-

ments entered of record which fulfill the requirement of due process of law and which were duly paid by appellant.

Attention is called elsewhere in the brief to the Kentucky statute protecting purchasers against back assessments for omitted property. If an assessing board need not enter its assessments of record but can keep them in a fluid state on the back of old envelopes, entering the name of one party upon the back of the envelopes and later the name of another party in the assessment record, it is obvious that the protection of a purchaser could be entirely defeated, for not only could he be held for assessments against himself in the corporation franchise record of assessments, but he could also be held for the memoranda on the back of the old envelope as well, notwithstanding that his name never appeared upon the memoranda and he knew nothing about it.

A tax is in its very nature a public proceeding upon the part of the State and it is indispensable to the security of property as well as of titles that every step in fixing liability should be a matter of record so that all persons can ascertain their rights and liabilities by an inspection of the record. This is a rule of distributive justice which is extracted from the experience of many centuries. It is part of the orderly procedure and method of taxation which has become by ancient custom the law of the land.

History of the Rule requiring a Record.

At the beginning of the 37th article of Magna Charta, translated as in the Statutes at Large, in

the form made in the ninth year of King Henry the Third, and confirmed by King Edward the First, in the five-and-twentieth year of his reign, it is provided:

> "Escuage from henceforth shall be taken like as it was wont to be in the time of King Henry our grandfather."

The tax herein referred to, according to Bouvier, is the same as scutage, the tax which those who, holding by knight-service, did not accompany the king, had to pay on its being assessed by parliament.

We have here in the Great Charter itself an undertaking to observe due process of law in taxation. How, then, was escuage "wont to be taken"?

In the first volume of Dowell's History of Taxation & Taxes in England (written by the Assistant Solicitor of Inland Revenue), beginning at page 49, will be found an account of Scutage, the land tax on Knights' fees. The account begins with a scutage in the reign of Richard I, taken in 1189, following the practice through subsequent reigns down to 1322. The manner of assessment was as follows (p. 52):

> "The assessments for a scutage were, as a general rule, based upon returns, which were required by the king's writ from the tenants in chief upon their fealty, 'per fidem et ligantiam quam nobis debes,' though perhaps returns may not have been required on every single occasion of a scutage.
>
> In their returns, or certificates, or cartels, *cartae baronum* they were usually termed, the military tenants stated the number of fees for which they were liable. The returns, though subjected to examination by the exchequer offi-

cers, and tested as to their correctness by reference to previous entries in the exchequer rolls, were, as a rule, accepted and entered in order in the red book of the exchequer. If any dispute arose regarding the number of fees for which a tenant was liable, the entry on the exchequer rolls was made as follows:—So-and-so is charged for so many fees 'quos non recognoscit,' in respect of which he denies his liability. The original cartels were kept in a hutch in the exchequer, and the entries formed the basis of subsequent taxation.

When the entries were completed, the king's writ issued to the barons of the exchequer to collect his scutage, and it was paid into the exchequer directly by those liable to payment."

Attention is called to the practice of entering the returns upon the exchequer rolls and in the red book of the exchequer and it is to be noted that the entries, not the returns, form the basis of subsequent taxation.

In the second chapter at page 57 is an account of Carucage, the tax on agricultural lands, for the period between 1194 and 1224. The following account is given of the Carucage in 1198 (page 57):

"The assessment was to be made, in every shire, by the king's commissioners (a knight and a clerk), the sheriff, and knights to be chosen for the purpose and under oath for faithful performance of their duty; who summoned before them the stewards of the barons, and in every township, the lord or bailiff and the reeve and four men, free or villein, and two knights for every hundred in the county, who took oath that faithfully and without fraud they would state how many carucates were contained in every township (with certain other particulars), and assessed to tax accordingly. The assessments

were registered in four rolls, of which the knight commissioner had one; the clerk, another; the sheriff, a third; and the steward of every baron, so much of the fourth as related in his lord's land."

Here the rolls were evidently the record of the assessment.

Beginning at page 60 is an account of Tallage, the taxation of Royal Demesne, covering the period 1189 to 1334. The following quotation is made from page 65:

"Again, ten years after this, in 1304, a tallage was enforced by Edward, probably in supplement of the scutage of 1303 for the war in Scotland. The grant made by London in 1294 was taken as a precedent, and the 'sixth penny according to the taxation of their goods' was exacted from the cities and towns. Writs were issued to sets of three commissioners, any two to act within the county or counties to which the writ was issued, to assess the tallage in the cities, boroughs, and demesne separately, by communities or by heads, as they might deem most expedient for the advantage of the king, but 'according to the ability of the tenants, and so that the rich be not spared, nor the poor too heavily taxed.' The tallage rolls were to be delivered, under the seals of the commissioners, to collectors chosen by them, who were to account for their collection to the exchequer."

We call attention to the tallage rolls which were evidently the essential records.

In chapter four of the same work beginning at page 68 is an account of the taxes on moveables between 1189 and 1334, beginning with the Saladin tithe, (A. D. 1188) and discussing the various grants of fractional parts of moveables. The following ac-

count is given of the grant of the thirteenth of moveables in 1207 (p. 69):

> "Commissioners for the assessment of the thirteenth were appointed in every county, and the sheriff was enjoined to assist them in performance of their duty. Every hundred and every parish was required to be separately registered, to the intent that the commissioners might be able to answer for every township separately.
>
> After the assessment of the tax by the commissioners in any hundred, city, or township, they were to cause the particulars of the assessment to be transcribed from their rolls, and deliver the same to the sheriff, who was to collect the tax in fifteen days. The rolls were to be retained safely in the custody of the commissioners till they should bring them to the exchequer."

At page 77 an account is given of the practice in assessment and collection of the following taxes: In 1294 a tenth and sixth (respectively), in 1295 an eleventh and seventh, in 1296 a twelfth and eighth, in 1297 an eighth and fifth.

> "The commissioners were required by careful examination to cause to be selected from every township four or two freemen, or less or more, according to the size of the township, the most trustworthy, responsible, and capable for the business. The freemen thus appointed assessors were to take an oath faithfully to assess all goods in field or house or elsewhere, '*en meson et dehors,*' as existing at the time for which the grant was made, fairly taxing them at their full value, '*solonc lour vereie value,*' to enroll as soon as possible all the parcels and the totals of the goods assessed in an indenture, of which one part was to be delivered, under their seals, to the commissioners, and the other part, under

the seals of the commissioners, was to be retained by them.

* * * * *

The tax was to be levied and collected as follows:

A schedule of assessment was to be made in duplicate by the commissioners, containing the name of every one taxed, and the amount with which he was charged. One of these was to be retained by the commissioners; the other was forthwith to be sent, under the seals of the commissioners, to the treasurer and barons of the exchequer."

In the second appendix to the first volume of Dowell's work will be found at page 251 some particulars of the schedules of assessment for the taxes on moveables at Colchester in 1295 and 1301. We quote the first item of this assessment:

"*Assessment for the 7th in* 1295. *Burgus Colchester.*

In the twenty-fourth year of the reign of King Edward, son of King Henry, an assessment was made within the precinct and liberty of the borough of Colchester, of the goods and chattels of every one, as possessed on Michaelmas Day last past, * * * for the grant to the said King Edward made for the defence of the kingdom, and as an aid for his war lately commenced against his enemies and the rebellious in France, by twelve burgesses of Colchester, that is to say (here follow their names), who say on their oath that—

Richard, prior of the church of St. Botolph at Colchester, had on Michaelmas Day last past: 10 quarters of wheat (*siliginis, gros blé*), at 5s. a quarter; 12 quarters of barley, at 4s. a quarter; 8 quarters of oats, at 2s. a quarter; 4 beasts of the plough, at 3s. a beast; 4 oxen, at half a mark (6s. 8d.) an ox; 1 bull, value 5s.; 6 cows,

at 5s. a cow; 32 sheep, at 8d. a sheep; and 7 lambs, at 6d. a lamb.—Total 10 l. 12 s. 6 d. The 7th of which = 30s. 4¼d."

After the lapse of over 600 years we are compelled to say that this tax assessment could hardly be improved upon. The good prior of the Church of St. Botolph not only had the assets enumerated, but he also had due process of law. A definite and permanent record was made at the time from which the ground of his liability and the amount of his tax could be absolutely determined. After these six centuries we can inspect the record and ascertain with certainty the cause and extent of his liability.

In the Third Appendix in the First Volume of Dowell's Work, beginning at page 260, will be found the Ordinance for Assessment for the Tenth and Sixth granted in 1322. At page 259, appears the substance of the writs appointing taxors, or commissioners, to the following effect:

"The king to his well beloved and faithful earls, barons, knights, freemen, and the whole commonalty of the county of * * * as well within liberties as without, and also to the bailiffs of communes, cities, boroughs, and our ancient demesne in the same county, greeting. Whereas the earls, barons, knights, freemen, and commonalty of the counties of our realm have granted to us a tenth of all moveables which they had at the feast of St. Andrew the Apostle last past, and, in our ancient demesne, a sixth, and the citizens and burgesses of the cities and boroughs of the said counties of the realm, in like manner, a sixth of all the goods which they had on the said feast, lately in a certain treaty had between ourselves and the prelates, magnates, and counties of our kingdom at

York; to be collected, levied, and paid into our Exchequer.—Then follows the appointment of two knights (named in the writ); who, with the assistance of a clerk to be chosen by them for the purpose, and for whom they are responsible, are to assess and collect the said tenth in the said county, and the said sixth in the cities, boroughs and ancient demesne in the said county, as well within liberties as without, according to the form delivered to them under the royal seal, &c. &c. The usual writs for assistance were also issued to the sheriffs of counties."

The Ordinance for Assessment itself is set out in Law French, beginning at page 260. The material part of our present inquiry is the record which was required to be made. The assessors were required to assess the goods of the inhabitants according to their true value.

"Et les frount embrever et mettre en roule endente tut pleinement, le plus en haste q'il purrent, et liverer as chiefs taxours l'une partie desoutz leur seals, et reprendre devers eux l'autre partie desouz les seals des chiefs taxours.

Et quant les chiefs taxours averont rescue en tiel manere les endentures de ceux qe serront juretz a taxer en citez, burghs, et autres villes, mesmes les chiefs taxours loialment et peniblement examinent celes endentures; et si eux entendent q'il eit aucune defaute, ceux tantost l'adressent, issi qe rein seit concelee, ne pur doun ne pur reguard de persone meyns taxe qe reason demande."

Not only were the Assessors required to write down and place upon an indented roll the valuation which they had made of each man's goods, but in addition thereto, at the time of collection, the chief

taxors were required to make upon other rolls a schedule of assessment, as follows:

> "Et facent faire deux roules de la dite taxacion, accordanz en touz pointz; et retiegnent l'un devers eux, pur lever la taxacion, et l'autre eient a l'Escheqier a lendemein de la cluse Pasqe proschein a venir, a quel jour il frount lour primer paie."

Mr. Dowell says that the form of Ordinance for the assessment of the 15th and 10th, in 1334, is practically the same; citing Par. Rolls., Vol. 2, page 447. But it is evident that what was due process of law, in the assessment of taxes, at least as far back as 1322, was lamentably lacking in the Commonwealth of Kentucky in the case at bar, nearly 600 years later.

In 3 Dowell's History of Taxation & Taxes in England an account is given in the third volume at page 80 of the Subsidies of Tudor times. The manner of the collection of the Subsidy, which was a tax upon moveables and upon land, was as follows (pp. 80-81):

> "The commissioners for the subsidy were appointed by the lord chancellor, the lord treasurer, and other great officers of the crown, or any two of them, the lord chancellor being one. The commissioners were to divide themselves for distinct hundreds, wards, &c., within the limits of their Commission, and issue precepts to the constables and other inhabitants to attend and be examined. The assessors were appointed by the commissioners, and returned their assessments to them, and persons dissatisfied with the assessments were allowed an appeal to the commissioners. The collectors were appointed by the commissioners, and their names were re-

turned to the high collector, an officer to be appointed in every shire and division by the commissioners, to whom the sub-collectors were accountable and who was himself accountable to the exchequer. One duplicate of the assessment was to be given to the high collector, and the other was to be returned into the exchequer to be a charge upon the high collector's receipt. The high collector gave security to the commissioners to answer for the money by him received.

Copies of the assessments were delivered to the sub-collectors and precepts under which they had authority to distrain the lands and goods of persons assessed by virtue of the Act."

At page 86 of the same volume an account is given of the method of the collection of "monthly assessments," a property tax under the Commonwealth, reference being given to the Taxing Act of 1656, citing Scobell, Acts and Ordinances, Anno 1656, c. 12. We quote from page 86 of the Third volume of Dowell, as follows:

"The assessors are required, when their assessments are made, to deliver a copy to the divisional commissioners, who are to cause copies of the assessment to be made in duplicate and sign and seal the duplicates.

Of these duplicates, one is to be delivered to 'one or more honest and responsible person or persons' whom they are to nominate and appoint to be sub-collector or sub-collectors for each parish, township or place, with a warrant to collect the whole three months' assessment at once, and pay the moneys received by them to the head collector appointed by the commissioners. The other duplicate is to be delivered to the 'receiver' for the particular county or town, to be by him transmitted to the lords commissioners of the treasury."

It may be reasonably believed that the oldest of English records are concerned with the subject of taxation. The Rolls of the Exchequer are certainly of high antiquity, going back as far as the reign of Henry the Second (Stubbs), while Domesday Book itself was a description of land for taxing purposes.

We have in Maitland's "Domesday Book and Beyond" a scholarly essay on the value of the Domesday Book, as material for the present day student of early English institutions.

Maitland says that we know practically nothing of land law preceding the Norman Conquest. The chronicles of the monks tell of the heavy land taxes levied by the Kings, under the name of "geld" or danegeld; the name indicating the origin and purpose of the tax, viz: to pay tribute to the Northmen. How often this tax was levied we cannot be sure, but unless the records seriously mislead us it was levied every few years and for heavy sums.

In the winter of 1083-4, William the Conqueror levied a geld of "72 pence upon the hide." The hide seems to have been a unit of land for purpose of taxation. An owner of a landed estate was taxed according to the number of "hides" which his land equaled, which in turn depended on its amount and productiveness. The Domesday Book was planned by William to serve as a new basis for taxation of the landed estates of his Kingdom.

> "The assessment of the geld sadly needed reform. Owing to privileges and immunities that had been capriciously granted, and owing also to a 'radically vicious method of computing the

geldable areas of counties and hundreds; the old assessment was full of anomolies and iniquities. But the right to levy the 'geld' was a valuable right and to secure a due and punctual payment of it was worth a great effort; 'a survey such as had never been made and a record such as had never been penned since the grandest days of the old Roman Empire.'

That William intended to correct the old assessment or rather to sweep it away and put a new assessment in its stead seems highly probable, though it is not proved that he accomplished it entirely.

Concerning each estate the royal officers were to know the number of geldable units for which it had answered in King Edward's time; they were to know the number of plough oxen that were upon it; they were to know its true annual value; they were to know whether that value had been rising or falling during the past twenty years.

As a general rule the account given by Domesday Book of any manor contains three different statements about it which seem to have some bearing on subject of our present inquiry.

A. It will tell us that the manor is rated to the geld at a certain number of units (which units vary in different counties, yokes, hides acres, etc.).

B. It will tell us that the manor contains land for a certain number of teams or for a certain number of oxen.

C. It will tell us that there are on the manor a certain number of teams some of which belong to the Lord and some to the men."

Maitland's conclusion is:

"That the Domesday Book has been well called a rate book. Our record is no register of title, it is no foedary, it is no costumal, it is no rent roll; *it is* a *tax book*, a *geld book*.

There was really very little change in the method of taxing land, from the time of William to our revolution. The assessments were made at long intervals, and were made the basis of many levies of taxes. The levies gradually tended to become more frequent and finally were annual. In Blackstone's time, the levy was made on the county, and the amount each estate had to pay was determined by a valuation set on the land as far back as 1692. How unjust such a valuation would be after an interval of one hundred years, we may easily surmise."

We have found the following act which shows the method of assessment in England at the time of the adoption of our Constitution. It will be noted how explicit the requirement of a record of the assessment is.

Chap. 33, Geo. III, page 26, Statutes at Large of England:

"An Act to remove certain difficulties relative to voters at county elections" passed in 1780.

"Sec. III. And be it further enacted, That the Commissioners of the land tax for that part of Great Britain called England, or the principality of Wales, at their respective meetings held for appointing assessors of the land-tax for the several parishes and places lying within the division for which such Commissioners shall act, shall cause to be delivered to each of the said assessors, a printed form of an assessment, as set forth in the schedule hereunto annexed; and the said assessors are hereby required to make their assessments according to the said form; and shall make three duplicates of such assessments; * * * and the said Commissioners are hereby required to cause one of the said duplicates so amended (after the same shall be duly signed and sealed by the said Commissioners, or any three of them) to be returned to the said

assessors or one of them; and such assessors are hereby required to deliver such duplicate, so amended within ten days after the receipt thereof, to one of the Chief Constables of the hundredth, lath or wapentake, within which the parish or place for which such assessment was made shall be, taking the receipt of such Chief Constable for the same, and which receipt such Chief Constable is hereby required to give; and such Chief Constable is hereby also required to deliver such duplicate upon oath (which oath the said magistrates are hereby impowered to administer), without any alteration, at the next general quarter sessions of the peace for the county, riding or division, within which such assessment shall be made, in open court, the first day of such session, to the clerk of the peace attending such session, to be by him kept and filed amongst the records of the sessions."

The meaning of the phrase "due process of law" in the Fourteenth Amendment is the same as in the Fifth Amendment where it is a limitation upon the powers of the general government and in order to ascertain what the makers of the Constitution considered due process of law so far as taxation is concerned, nothing is so instructive as to examine the laws of the mother country and of the Colonies as they existed at the time the Constitution was adopted. We shall find that the practice of making a record as part of the process of assessment was universal.

Turning to the laws in effect in the various colonies we find invariably the provision for a record as part of the assessment. The details of the statutes differ but the substance of the provisions is always to be found.

LAWS OF VIRGINIA—Hennings Statutes at Large, Vol. 12, p. 243. Chap. VI, Oct. 1786, General Assembly.

"An Act to amend the Act entitled An Act for ascertaining certain taxes and duties, and for establishing a permanent revenue."

Page 245:

"That every Commissioner thus qualified shall perform the following duties within his district: He shall in the first place apply to the Clerk of the Court for the books of the Commissioners, appointed under the act for equalizing the land tax, which book or books the Commissioners of the land tax are hereby directed to deliver to the said Clerk on application, * * * and moreover to furnish such Clerk with an attested copy of the land tax from the last statement on the equalizer's books, and the Clerk, upon being furnished with such book or books, either by the Commissioners of the land tax, or from the solicitor's office, shall aid and assist the Commissioners appointed by this Act, in selecting therefrom the owner's name, and the tax on every tract of land or lot within each district, in the following manner and in the form hereto subjoined. There shall be entered in one column the owner's names in alphabetical order, the number of acres or lots, the rate at which such land is valued by the acre, the amount or total value of each lot or tract of land, and the tax payable thereon; which book the said Commissioner shall keep so long as he shall continue in office, and on his death, resignation or disability to act, shall be delivered to the succeeding Commissioners for the district. * * *

Page 246:

"That the said Commissioners shall severally on the tenth day of March annually, begin and

continue proceeding without delay through their respective district, and call on every person subject to taxation, or having property in his or her possession or care, on which any tax is imposed, for a written list thereof, which list being corrected, if necessary, and distinctly read over by the Commissioner to the person delivering the same, he or she shall then make oath or affirmation, that such list contains a just and true account of all persons; and of every species of property in his or her possession or care within that district (land only excepted) subject to taxation, on the ninth day of March then next preceding. * * *

That each of the said Commissioners shall, after collecting the lists of property from the inhabitants of his district in manner before directed, make four alphabetical general lists therefrom, showing in columns according to the form hereto also annexed, the date when each list was received, the persons chargeable with the tax or taxes, and the number or quantity of every species of property, inserting particularly the names of all free males subject to tax, distinguishing those also, subject only to parish and county levy, which list shall be kept and delivered in the following manner. Each Commissioner shall retain one of those lists in his own possession, so long as he continues in office, and afterward to be delivered to his successor as in the case of the land tax books; one other of the lists, together with the lists taken from the individuals in his district shall be returned to the Clerk, who shall examine the same, and if found to be erroneous either in addition, or otherwise, to correct the others and then certify them to be true copies: The list in the Clerk's office shall serve for laying the County levy. and fixing the poor rates, and be subject to the inspection or examination of every person who may choose to examine the same, provided that they be not

taken out of the said Clerk's possession, and copies may be had at the charge of the person or persons desiring the same. One other of the said lists after being certified by the Clerk, shall be delivered by the Commissioners to the high sheriff of the County, as his guide to collect the taxes, and the remaining fourth list, being also certified by the Clerk, shall be transmitted by the Commissioner to the Solicitor's office, there to be minutely examined, and to be produced by the Solicitor and admitted as evidence by the general Court for the amount of taxes charged the sheriff. * * *

That the said Commissioners shall also at the time of delivering the lists of taxable property hereinbefore directed, deliver to the Clerk of his County, at the Solicitor's office a fair and correct copy of the state of the land tax, noting the alterations, alienations, divisions and additions that may have taken place in the preceding year, within his district, to enable the Clerk to adjust his book of the land tax, and the Solicitor to adjust the equalizer's books, and the book containing the land tax, together with the annual returns of the several Commissioners lodged in the Clerk's office, shall be subject at all times to the inspection of every person, in like manner as the lists of taxable property, and the Commissioners shall also deliver to the sheriff an exact list of taxes, due from all and every person and persons, for land within his district to enable the sheriff to proceed in his collection."

(It will be observed not only that a record is required, but the statute itself lays stress upon the record's being subject to public inspection.)

"Act for laying a tax for the year one thousand seven hundred and eighty-eight." Passed Feb. 1, 1788, found in Digest of Laws of State of Georgia. Marbury and Crawford—1802.

"A tax of 12 sh. and 6d. for every £100 value of lands—The law provides the value to be placed on each description of land—Also poll taxes on persons—taxes on negroes per head—carriages, etc.—"

Sec. 4: "And be it enacted by the authority aforesaid: That the mode of collecting the taxes shall be as follows: each militia company shall form one district, the Superior Court at the stated spring term, shall appoint a magistrate or some other discreet person in each district, to receive the returns of taxable property in such district, and the Clerks of the respective Courts shall—within twelve days—give notice to persons appointed receivers—etc. * * *

And it shall be the duty of the receiver appointed to give notice by advertisement to the inhabitants of the district, when they are to bring in their returns, at least ten days before the time appointed; he shall make out a return including the whole so received by him, and also the taxable property of non-residents, and such defaulters as neglect or refuse to make their returns within his district, and transmit the same to the register of probates in each County, on or before the first day of July, and shall at the same time give an account on oath of the taxable property, and publish within 1 month thereafter in the gazette the names of all such as have refused or neglected to give in their returns agreeable to law, under the penalty of £50 for his neglect; and the said receiver shall be entitled to receive one shilling for each re-

turn in his district.— * * * The register of probates shall digest the whole into one general return agreeable to the form annexed to this act, containing a statement of the taxable property of the whole County, and the amount thereof; one copy of which he shall transmit to the treasurer of the State, and another to the collector of said County appointed by this act, and one shall be kept in his office, for the free inspection of the inhabitants."

LAWS OF DELAWARE—1797—2 Vol.—(Chap. 52-a, 16 Geo.: II).

Sec. 2: Provides for election of assessors yearly—by freeholders for each "hundred."

Sec. 3: Provides that Justices of the Peace, eight grand jurymen, and assessors should meet and determine what sums will be needed for the public service.

Page 261, Vol. I.

Sec. 4: The Clerk of Peace shall send for precepts to Constables in each hundred, requiring the Constable to bring in a true list in writing upon oath, of names of all taxable persons dwelling within his district, names of all freemen, inmates, hired servants, and all others residing or sojourning in his district. These lists should be returned to the justices at the November sessions.

Sec. 5: And be it further enacted by the authority aforesaid, That after settling and allowing all just debts and demands chargeable upon the respective Counties, and adjusting and settling the sum and sums of money of necessity to be raised as aforesaid, to be allowed by the Justices, Grand Jurymen, and Assessors, aforesaid, it shall and may be lawful for the Assessors of the respective Counties, and they are hereby required to meet together, and by the Constable's returns, or any other lawful way or

means, inform themselves what persons and estates in their respective Counties are rateable by virtue of this Act; and shall forthwith equally and impartially assess themselves and all others as aforesaid (exempting out of such assessments all unsettled tracts or parcels of land, and having due regard to such as are poor, and have a charge of children, the poorer sort of such not to be rated under 8 Pounds and no single man who at any time of assessment is under twenty-one years of age, or hath not been out of his servitude or apprenticeship six months, shall be rated by this Act; and as to those single men who have no visible estates, they shall not be rated under Twelve Pounds, nor above Twenty-four Pounds.)

(Repealed—Supplanted by Act—1796. Chap. XCVIII—page 1247. Entitled "An Act for Valuation of real and personal property within the State.)

Sec. 6: And be it further enacted by the authority as aforesaid, That the said respective sums of money with the names of the persons to whom payable, and the particular uses to which they are appropriated, shall be entered on the minutes kept by the Clerk of the Peace of each Respective County; who is to officiate as Clerk of the Levy Court, which said Clerk is to transcribe, from said minutes, fair and true duplicates of all the proceedings of said Court, to be delivered to the Treasurer of each respective County for the time being; who is hereby required to provide good and sufficient books, at his own cost and charge, where he shall make entries of the said duplicate accordingly.

Sec. 7: "And be it further enacted by the authority aforesaid, That after the making such rates and assessments as aforesaid the Clerk of the Peace in each respective County shall set up, or cause to be set up and published in the most public places of the respective hun-

dreds of the said Counties, in writing under his hand, a true copy of such rates and assessments as aforesaid, together with notice of the day appointed by this Act, for holding the Court of Appeal:" Further provides for penalty on Neglect.

Sec. 8: And be it etc. * * *

Sec. 9: Further provides that Court of Appeal as above, shall appoint a collector of public tax—"and immediately after such second meeting or days of appeal as aforesaid, shall cause duplicates of said assessments of each hundred to be transcribed from the Records of the Court by the Clerk, and by him delivered to the Collector of each respective hundred, with a warrant from the justices aforesaid or any two of them, empowering such Collector, in his proper district, to demand and receive of the persons assessed the respective sums of money wherewith they shall stand charged in his list or duplicate as aforesaid."

Further provides for levy by districts for failure to pay tax—so assessed.

Chap. XCVIII, p. 1247, passed 1796.

Page 1257.

Sec. 18: "And be it enacted, That the Clerks of the Peace in each county shall attend the said Commissioners of the tax in his County respectively, as often as they shall meet, who shall file in their offices, respectively, the returns of the valuations of the Assessors, with their corrections by the said Commissioners, in a separate place to be provided for that purpose; and shall generally do and perform the duties of a Clerk to the said Commissioners of his County respectively.

Sec. 7: "That every Assessor shall inform himself, by all lawful ways and means, of all personal property in his hundred, (except as before excepted) and shall immediately, on such information, proceed to value such property,

agreeable to the directions of this Act; and shall form a statement in writing, of the particulars of all personal property in his respective hundred, and of his valuation thereof—etc. * * *

Sec. 11: * * * "That Comm. of the tax shall meet, etc., at which times the Assessors of each hundred shall attend on the said Commissioners, and return to them in writing their several valuations of real and personal property in their respective hundreds, according to directions of Act to which this is a supplement; and after the assessments and valuations of the real and personal property within each County shall be arranged by the said Commissioners, agreeably to the directions of the Act to which this is a supplement, the Clerk of the Peace in each County shall set up or cause to be set up and published in the most public places in the respective hundreds of said Counties—on or before the first day of February in every year in writing under his hand, an alphabetical list of each person whose property is valued, the number of acres of land and their aggregate valuation, the number of slaves and their aggregate valuation, the rate of the person, and the amount of the valuation of all other their personal property, and the amount of the valuations of the whole real and personal property of every person within the respective hundreds together with notice of the day appointed by this Act for holding the Court of Appeal."

Acts and Laws of the State of Connecticut—New London—1784—

Selection from "An Act for the Direction of Listers in their Office and Duty."

Page 129.

"And the said Listers shall give Warning to the Inhabitants of their Respective towns, to

give in the Lists of their Polls and Rateable Estate, by Posting up a Notification in Writing, signed by the Listers in such Town, in the Month of July, annually, on the Public Sign-Post, and some public Place in every Society in such Town; Thereby giving Notice to all Persons obliged by Law to pay Taxes, to give in their respective Lists, according to Law. Which Warning so posted up as aforesaid, shall be sufficient Notice to such Persons to give in their List to the Listers. And the Inhabitants, being so warned, shall give in to the Listers in Writing, a true Account of all their listable Polls, and of all other rateable Estate, being their Property as belonging to them, on the twentieth Day of August following, at or before the tenth day of September following: particularly mentioning therein all such Things as are in this Act hereafter expressly valued, signed with their names, which Accounts the said Listers shall accept, adding thereto according to their best Judgment, a value for all things hereafter mentioned in this Act to be listed, that are not particularly valued, and make the whole into one general List.

"That the Listers shall receive, make up, and transmit to the General Assembly in October, annually, the Lists of such Towns, with a Certificate from an Assistant, or a Justice of the Peace, or Town Clerk, before whom said Listers were sworn, that they were sworn to a faithful discharge of their Duty before the first Day of July preceding."

* * * * *

"That the said Listers after the Rising of the General Assembly in October annually, shall and they are hereby required, carefully to inspect the said List till the last Day of December following, annually, and to add Fourfold for all the Polls and rateable Estate they shall find left out of List, by any particular Person or Persons, the Property whereof did belong unto such Per-

son or Persons, on the twentieth day of August, preceding, giving Notice thereof to the Persons fourfolded."

* * * * *

"That said Listers shall annually, some Time in the Month of January, deliver the List of the Polls and rateable Estate of the Inhabitants of their Town, made out according to Law, to the Clerk of the Town, taking his Receipt for the same; upon the Penalty that every Lister that shall neglect the same, shall pay to the Treasurer of such Town the Sum of Five Pounds; to be recovered by Action, Bill, Plaint or Information."

LAWS OF MARYLAND—(JOHN HENRY). 1785, Ch. 53.

"An Act to ascertain the value of land in the several Counties—of this State for the purpose of laying the public assessment."

Sec. XV. The Commissioners of the respective Counties * * * shall on or before the first day of Sept. next, make out a fair and correct account of the property by them respectively ascertained and valued as by this act is directed, and the same shall sign and enclose in a cover, directed to the Clerk of the House of delegates * * * and also the Commissioners within the time specified and under like penalty, shall deliver a copy of such account to the Clerk of his County, to be by him recorded; and the Clerk of the house of delegates shall enter the said summary account in a book to be provided for that purpose, and keep the original in his office. * * *

(1797—Chap. 89.)

"An Act for the Valuation of Real and Personal Property within this State:—"

Sec. VI. Commissioners shall—meet—divide the Counties into districts, and appoint in each district an Assessor. * * *

"And the said Commissioners shall also appoint a day and place, between the first and twentieth days of May next for the said Assessors to appear and bring in writing the several valuations of property in their respective districts in pursuance of this Act.

Sec. XVI. "And Be it Enacted That every Assessor shall inform himself, by all lawful ways and means, of all real and personal property in his district, (except as before excepted) and shall immediately on such information, proceed to value such property agreeably to the direction of this Act, and shall bring with him, at the time and to the place appointed by the Commissioners for his appearance, a certificate, in writing, of the particulars of all real and personal property in his district, and of his valuation of the personal estate, and of such real estate as he shall be directed to value by the Commissioners, in which shall be expressed the number of slaves of each description within this Act, and the weight of plate, and the value of each, of the above species of property, and all other real and personal property, and the value thereof, and the amount of the value of the whole real and personal property of every person in his district, and the amount of the value of all real and personal property in the district, and shall return with his certificate, an alphabetical list of the names of all persons whose property he shall value." (This section reenacts Sec. XXIII of Act of 1792.)

"An Act for the valuation of real and personal property within this State." (1797—Ch. LXXXIX.)

Sec. XXVI. "And be it Enacted That the Commissioners of the several Counties shall direct their Clerk to enter in a book to be provided for that purpose, an accurate and fair account of all the real and personal property within their County, and the valuation thereof

as returned by the Assessors, or as corrected by them, with an alphabetical list of the persons chargeable with the assessment of such property.

Sec. XXVII. And Be it Enacted That the Clerk to the Commissioners in each County shall on or before the first Monday of July next, make out from the Assessor's Certificates, and the correction thereof by the Commissioner, a summary account or list (in columns) in which shall be expressed the number of slaves of each description within this Act, the weight of plate, and the value of each of said pieces or kind of property, and all other personal property, and the value thereof in each district * * * and shall lay the same before the Commissioners, who, after correction thereof, if necessary, shall sign and enclose the same, endorsed for the public service, to the Clerk of the house of delegates, * * * and shall also deliver to the Clerk of his County Court a duplicate thereof, to be lodged among the records of the said County in eight days thereafter; and the Clerk of the house of delegates shall enter the said summary account in a book to be provided for the purpose, and keep the original in his office, and on the second day of the next meeting of the general assembly, he shall lay the same before the house of delegates, for the inspection of the members.

Sec. XXXI. That every Collector or his deputy shall inform himself by all lawful ways and means of all personal property as aforesaid in his County (except the property by this Act excepted) and shall immediately on such information proceed to value such property agreeably to the directions of this Act, and shall return at the time and at the place to be appointed by the Commissioners of the tax of the County of which he is Collector, a certificate in writing, of the particulars of all the said personal property in his County, and of his valua-

tion of the same, in which shall be expressed the number of slaves of each description, agreeably to this Act, and the weight of plate; and shall return with his certificate an alphabetical list of the names of all such persons whose property he shall value."

LAWS OF MASSACHUSETTS—Laws of Commonwealth of Massachusetts passed 1780 to end of 1800. Manning & Loring.

Act—Feb. 20-1786.

"Act for the Choice and Appointment of Assessors and for assigning their Powers and Authority."

Sec. I.—Provides that each town shall choose persons to be "assessors of such rates and taxes as the General Court shall order town to pay," etc.

"And the Assessors so chosen and sworn, shall assess the polls of, and estates within such town or district, their due proportion of any tax, according to the rules set down in the Act for raising the same, and make perfect lists thereof under their hands or the hands of the major part of them, and commit same to the Collectors," etc.

"And the said Assessors shall also have their assessment recorded in the town or district book, or leave an exact copy thereof, by them signed, with the town or district Clerk, or file such copy in the Assessor's office, where any such is kept, before the same shall be committed to a Constable or collector, the sheriff or his deputy, to collect, and at the same time shall lodge in the said Clerk's office the invoice or valuation, or a copy thereof, from whence the rates or assessments are made, that the inhabitants, or others rated may inspect the same."

Sec. 8. "That all country, town, district, pre-

cinct, plantation and parish rates and taxes, shall be assessed and apportioned by the Assessors of the several towns, etc., * * * upon the polls of and estates within the same, according to the rules that shall from time to time be prescribed and set, in and by the then last tax-act of the General Court; and such Assessors shall cause attested copies of such assessments and valuations to be lodged in the Clerk's office of the place where the same are made, or file the same in their own office, if any such they have.

An Act for the Choice and Appointment of Collectors of Rates and Taxes, and for Ascertaining their power and Duty.

March 16, 1786.

"Sec. 2: That if any person shall refuse to pay the sum or sums which he shall be assessed as his proportion to any rate or tax, in the list committed to any Constable or Collector, under the hands of the Assessors of such town, district, plantation, precinct or parish, or the major part of them, upon demand thereof made by such Constable or Collector, by virtue of the Warrant to him given, it shall and may be lawful to and for such Constable or Collector, and he is hereby authorized and required, in such case—to distrain the person so refusing by his goods or chattels," etc.

"An Act for Apportioning and Assessing a Tax of £72000 upon the Several Towns," etc. Vol. 5—Acts and Resolves of Province of Mass. Bay 1769-1780.)

Page 1407—Sec. 4: "And the treasurer in his said warrant shall likewise require the Assessors to make a fair list of said assessments, setting forth, in distinct columns, against such person's name, how much he or she is assessed

at for polls, and how much for real estate, and how much for personal estate, as aforesaid; and if as a guardian, or for any estate in his or her improvement, in trust, to be distinctly expressed; and shall also insert upon their rate bills the number of acres of unimproved land which they have taxed to each of the non-resident proprietors of land within their respective towns or places, and also the value at which they have estimated the same; and the list or lists so perfected, and signed by them, or the major part of them, to commit to the Collector or Collectors, Constable or Constables of any such town or place," etc.

LAWS OF NEW HAMPSHIRE—"Laws of New Hampshire" Printed by John Melcher, 1792.

"An Act for establishing an equitable method of making taxes and for Ascertaining the powers of Selectmen." Passed Feb. 8, 1791.

"That the selectmen of the several towns in this State, be, and they hereby are authorized, empowered and required seasonably in every year, to assess the polls and estates within such towns according to the rules and directions of the law, their just and equal proportions of all sums of money, granted by the general court, for which they shall have a warrant under the hand and seal of the treasurer of this State for the time being;" etc.

(p. 182.) "And the selectmen shall make lists of all such assessments under their hands, and commit the same unto the Collector or Collectors of their respective towns, with a warrant under their hands and seal in due form of law; and in such lists shall be set down and expressed the names of all the inhabitants or residents therein, taxed for their polls and estates, or estates only, and their several pro-

portion of each tax; and a particular description as herein mentioned of the estate of any persons taxed in such lists, who are not inhabitants of such town, and the proportion of such estate to each tax. And the said selectmen shall cause a fair entry and record to be made of all invoices by them taken, and assessments by them made, in a book of record of the doings and proceedings of the selectmen in their said office, which book shall be the property of, and shall be open to any of the inhabitants of said town.

And the said selectmen shall also have their assessments recorded by the town clerk in the book of records belonging to such town, or shall leave an attested copy with him—seasonably for that purpose, and a copy of the invoice from which the assessment was made, shall be recorded or left with the town clerk in manner aforesaid, that the inhabitants or others rated may inspect the same."

Act declaring Duty and Defining Powers of Collectors of Taxes. Passed Feb. 11, 1791.

(p. 191.) "Be it enacted by the Senate and House of Representatives in General Court convened: That it shall be the duty of the collectors in every town or place in this State, seasonably to collect all the taxes assessed on such towns or places, for which they shall have sufficient warrants, under the hands and seal of the selectmen of such town or place; and to pay the same according to the directions given in such warrant.

* * * * *

And upon the neglect and refusal of payment of any inhabitant or resident taxed in such list, the said Collector is hereby empowered to distrain the goods or chattels of the person so neglecting or refusing."

LAWS OF NEW JERSEY. "Act of the Council and General Assembly of the State of New Jersey." 1784.

Chap. CCCXVI. June 22, 1782.

"Act to raise sum of Ninety Thousand Pounds in the State of N. Jer."

Sec. 5: "That all and every the Inhabitants of the several Townships, etc.—On application to them made by the Assessors of the respective Townships, Precincts and Wards, shall forthwith give a true and full account of their names and surnames, and of their estates, real and personal, made rateable by this Act, which the Assessors shall take down in writing, in order to be enabled thereby to make just and true assessments, * * * and the said Assessors shall also at the same time taken an exact list of the Number of White Inhabitants within their respective townships, precincts or wards, and likewise the amount of all the Certificates given by any of the late County Contractors of this State and of the surplus certificates given by the Township, precinct or ward Collectors to each of the inhabitants thereof, to be inserted in their abstracts.

Sec. 6. That the Assessors aforesaid respectively shall take a true account, and make an exact list of the persons and things made rateable by this Act; * * * and shall meet together for settling the Quotas (" " ") at the place of holding the courts in the several Counties, * * * and shall likewise then and there compute the value of all the estates, real and personal, taken by the said Assessors within each of the said township, precincts or wards, in each and every County of this State, at such value as they or a majority of them then present, in their discretion, shall think reasonable to fix, * * * and shall also

make out a true Abstract of the Amount of all the Articles and things made rateable by this Act, in each of the respective townships in the several Counties to which they belong, in manner and form following, videlicet." (Here follows a form in statute.)

Chap. CCCX-CXIII. Passed Dec. 20, 1783.

(p. 368.) Sec. 7-8—Substantially same as 5-6 above.

Sec. 8: "And the Assessors respectively shall deliver to the Collector of each Township, Precinct, or Ward, of the several Counties within this State, true and exact Duplicates of the said Assessments on or before the second Tuesday in August annually; * * * containing as well a full account of the Certainties and Rates aforesaid, as of the rateable Estate given in by each Person, and the Assessments made thereon; which Duplicates shall be made in the same Manner and Form with the Abstract before mentioned, excepting that the names of the several persons shall be inserted in the place therein allotted for the names of the several townships; * * * Copies of which Duplicates the said Assessors shall also deliver to the Collectors of the several Counties, who are hereby required, at the Times before directed for the Payment of the Monies raised by this Act, to deliver or transmit the said Duplicate, together with the said Abstracts, to the Treasurer, and to pay the Monies or Bills issued for Payment of Interest collected thereon by the Times before mentioned.

Sec. 13: That the Collectors of the respective Townships, Precincts or Wards of this State, within 20 days after the Receipt of each Duplicate and Assessment as aforesaid, shall make demand of the several and respective sums assessed on each Person within their respective Townships, Precincts or Wards, in Person or by Notice left at his place of Abode."

LAWS OF NEW YORK. 11th Session—Ch. 65. Passed March 7, 1788.

"Be it enacted by the People of the State of New York, represented in Senate and Assembly, and it is hereby enacted by the authority of the same, That the assessors of each respective city, town and place in every County of this State, shall yearly and every year, as soon as conveniently may be after they are chosen and qualified, proceed to enquire into the value of the real and personal estate of every freeholder and inhabitant, within the city, town, or place, whereof they are assessors, and shall make out a true and exact list of the names of all the freeholders and inhabitants of the respective cities, towns and places, for which they shall be chosen assessors; and of such who have estates therein and do not reside there; and opposite to the name of every such person shall set down the real value of all his or her whole estate, real or personal in the same city, town or place as near as they can discover the same, and shall set down the value of the real estate of each person as aforesaid in one column, and the value of the personal estate of each person as aforesaid in another column of the same list or assessment, leaving room sufficient opposite thereto to insert the sum each person is to pay; and shall complete the same list or assessment, signed by such assessors or the major part of them to the supervisors of the County in which such city, town, or place is or shall be situated as their Clerk on or before the last Tuesday in May. * * *

That the supervisors * * * shall thereupon cause a computation to be made what each pound of the sum total of the valuation of the estates in each city, town or place ought to pay off the sum so to be raised in the same city, town or place, and cause the same to be paid by each person to be inserted in the same lists

or assessments opposite to his or her name; and shall then and before the first day of September in every year, transmit the list or assessment of each city, town and place, so completed to the Collector of the same city, town or place, with a warrant under their hands and seals thereto annexed, commanding the same Collector to collect of and from all and every the person and persons named in the said list or assessment the several and respective sums mentioned and contained in the last column of the said list or assessment, and opposite to their respective names."

6th Session—Ch. 49. Passed March 25, 1783.

"That the assessors shall thereupon immediately proceed to make assessments on the several inhabitants, residents or persons holding or possessing real or personal estate within the city, town, manor, district or precinct, according to the estate and other circumstances and abilities to pay taxes, of each respective person collectively considered. * * * That after the assessors shall have made out the assessment roll, they shall thereupon cause the notifications thereof in writing to be fixed in at least four public places in the city, town, manor or precinct, and shall in such notifications assign a time and place when and where they shall meet, and that such time shall not be less than six nor more than ten days from the last day of their last meeting and that all persons who will attend may inspect the assessment roll. That upon hearing the proofs or allegations of any person or persons who are assessed at an higher or lower rate than they respectively ought to be, the assessors shall add to or deduct from the respective assessments in such manner as they shall deem reasonable, and make the necessary alterations in such assessment roll accordingly.

That as soon as the assessors shall have completed the assessment roll, the same subscribed by them shall be delivered to the supervisor or supervisors of the city, town, manor, district or precinct or in case of his or their death or absence to a justice of the peace of the County, whom the assessors shall notify for the purpose, * * * that such supervisor or justice shall immediately on receipt of such assessment roll proceed to make out two separate sets of tax lists, one set for the tax first to be collected as hereinafter directed, and the other set for the second tax to be collected as hereinafter directed. That the assessment roll and tax list shall respectively be of the form and upon the plan contained in the schedule hereunto annexed. * * *

That the supervisor or supervisors or such justice shall within five days thereafter complete and sign a tax list, and deliver to Collector or Collectors such parts of the said lists * * * as contains the tax which such Collector or Collectors respectively are authorized to collect of both the taxes to be collected by this Act."

LAWS OF NORTH CAROLINA—"Laws of North Carolina." Iredell, 1791.

General Assembly, 1784. Chap. I. (P. 475.)

"Be it enacted, etc.—That all lands as described by the aforementioned Act, Town Lots with their improvements, all free Males and Servants twenty-one years old or upwards, and all Slaves male and female between the age of twelve and fifty years, within this State, shall be subject to the Payment of public taxes; and the public taxes on such Property and Persons shall be assessed and proportioned as follows, viz. All Lands shall be liable to be taxed by the quantity, and Freemen and male Servants

twenty-one years old and upwards, and Slaves male and female between the Age of twelve and fifty years, shall be subject to a Poll-Tax."

Sec. IV. "That the Inhabitants of the respective Districts in each County shall attend at the Time and Place so to be appointed and shall return on oath in writing to the Justice appointed to receive the same, The Quantity of Land, the particular Tracts, the Counties in which the same lie, with the number of free Males and Servants twenty-one years old and upwards, the Number of Slaves male and female between the age of twelve and fifty years, which to him belonged or who lived in his Family, and the Number of Town Lots of which he was possessed on the first day of April then last past."

Sec. VII. "That The Justices who shall be appointed to receive the Lists of Taxable property, and the Assessors in every Town, shall make fair returns of their Lists and Assessments respectively to their respective County Courts next after such Lists shall be received and Assessments made, and the Justices shall in their Return (exclusive of the original Lists received by them) distinguish the Persons Names, the Several Tracts of Land, the Quantity and situation of each Tract, The Town Lots and number of Polls, white and Black, in the following manner, viz.:" (Here appears a form of record.)

Sec. VIII. "That the Clerk of each Court shall record at large in alphabetical order, the annual returns to be made by the Justice and Assessors in his County and the court shall and may make a reasonable Allowance for such service to be paid out of the County Tax."

Gen. Assembly. Oct. 22, 1784. First Session. (p. 515.)

Sec. III. "On or before the first Day of Nov. in every Year, the Clerks of the respective Counties within this State, shall furnish the Collectors of their Counties with a List of the taxable property in their Respective Districts, as the same Lists are directed to be made out by an Act, passed at Hillsborough, on the Ninth Day of April, in the eighth year of the Independence of this State, entitled "An Act to amend an Act for ascertaining what Property in this State shall be deemed taxable Property, the Method of assessing the same and collecting public Taxes; And the Collectors shall appoint the day and place in each District of said County, in the Month of April, when and where he will attend for the purpose of receiving from the inhabitants of such district, the public tax required by law from each inhabitant thereof, agreeable to the list of taxable property furnished him as aforesaid."

Laws of South Carolina—"Brevard's Digest" South Carolina Law, 1814. Vol. II. Act Passed 1788.

(Page 277.) Sec. 3. "That enquirers, assessors and collectors of the parishes of St. Philip and St. Michael, or any one or more of them, are hereby ordered and directed, on or before the first Monday in Sept. next and on or before the first Monday in September of each and every year thereafter, to go once to the several houses of the inhabitants of the said parishes, of which they shall give previous notice in the Gazette three weeks before they shall go to the said houses, and enquire into and take an account of all the real estates, and par-

ticularly in what parts of the said parishes the lands are situated, and of the slaves and other taxable property of the inhabitants which they shall be possessed of, interested in, or entitled unto, in their own right, or in the right of any other person whatsoever; and the enquirers in the other parishes and counties shall fix on convenient places to receive returns and payments of which places they shall give at least three weeks public notice, at three several times, and three several public places, and that no person be obliged to attend them more than fifteen miles distance from his house."

Sec. 6. "And the said enquirers, assessors and Collectors for the several parishes and Counties respectively within this State shall close their accounts with the treasurers * * * and at the closing of their accounts they shall exhibit two lists, one containing all the taxable property returned to them, annexed to the names of the persons who returned the same, with the sums paid by them respectively; a second, all the taxable property lying and being in the parish or county, which has come to their knowledge and has not been returned, which lists shall be given to the treasurers, and their accounts closed on oath in the following words. * * * "

RHODE ISLAND—"The Public Laws of the State of R. I. and Providence Plantations," 1798.

"An Act regulating the assessing and collecting of taxes."

Sec. 1.—(Provides that copies of Acts for assessing taxes—is to be delivered to Assessors and they shall notify inhabitants to hand in a list of their estates by a time fixed.)

Sec. III. "And Be it further enacted, that the Assessors shall, before they apportion the tax among the inhabitants, make a list containing

the value of each person's rateable estate by him given in; and likewise a list—containing the value of all such person's estates, according to the best judgment and estimate of the Assessors, who neglect or refuse to give in an account thereof agreeably to law, and of the number of rateable polls, and deduct the sum that the polls will raise from the sum to be assessed and levied; and the assessors shall cast the rateable estates, and thereby find how much per centum it will be and they shall apportion the tax accordingly."

Sec. V. "And be it further enacted, That the assessors shall in making the said list or estimate of rateable estates, distinguish therein those persons who give in an account or list of their estates, from those who neglect so to do; and shall also distinguish all taxes assessed for real estate from those assessed for personal estates, making in the tax bill a distinct and separate column for each; and shall deliver the said estimate to the Town Clerk with the said tax bill."

Sec. VI. "That the Assessor shall immediately upon their assessing and apportioning any tax to them committed to assess, send a true bill or list thereof to the town clerk of the town to which respectively they belong, under their hands; and if it be a State tax, the Town Clerk shall, upon receipt thereof, draw an exact copy under his hand, and send the same to the General Treasurer, with the names of the Town Treasurer and the Collector of taxes for his town; but if it be a town tax, he shall deliver the same to the Town Treasurer of said town. And the General Treasurer, on receipt of such copy, shall issue forth his warrant to the Collector of said town, and affix the same to the tax bill, commanding him in the name of the State, to collect the several sums of money

therein expressed against each person's name, by such time as by law is limited, and when collected to pay the same unto him or his successor in said office."

NOTE.—These provisions are as found in above Act passed in 1798: This is a modification of an Act passed 1785—which we have been unable to find.

We take the following from a reprint of an old manuscript:

"An Act for ye Enabling ye General Treasurer"—Passed att a General Assembly held at Newport May ye 6th 1702—

* * * *

"Bee it further enacted by ye authority aforesaid yt ye aforesd assesors or Majr. part of them upon ye finishing ye said work shall forthwith return a true bill or list of each persons proportion of said rate or rates under their hands unto the town clerk of each town where they are respectively belonging and said Clerk shall send unto the General Treasurer a perfect copy of said bill under his hand indented, upon receipt whereof the General Treasurer shall grant forth his warrants to the several constables of each town respectively in said Colony commanding of them and every of them to collect and make return of all such sums of money thereby committed to their charge for gathering thereof to himself or successors in said office et * * * *

"PA. STATUTES.—Taken from Laws of the Commonwealth of Pennsylvania." By Alexander Dallas, 1797. Vol. 1, page 219, Entitled: "An Act for raising County rates and levies."

Sec. IV Provides that Commissioners and assessors shall meet and calculate the amount that will be needed for the government during the coming year.

Sec. V. "And be it further enacted that the said Commissioners or any two of them, in each County, shall within six days after their said annual meetings, issue forth their precepts, directed to the Constables of every township, requiring them to bring to the said Assessors, within 6 weeks next after the date of such precepts, fair and true certificates in writing, upon their oaths or affirmations, of the names and surnames of all and every the persons dwelling or residing within the limits of those townships or places with which they shall be charged, and

the names of all freemen inmates, hired servants and all other persons residing and sojourning in every of the said townships, together with an account of what tracts and parcels of land and tenements they respectively hold in such township; and how many and what parts of those tracts are settled, improved or cultivated, and how much of the same land is sowed with corn; and how many bound servants and Negroes, with their ages; and what stock of cattle, horses, mares and sheep, they possess. * * *

And that the Assessors for the said respective Counties, or any four of them shall meet at the day and place where the Commissioners precepts are made returnable, and then and there receive the Constable's returns; and shall thereupon by the oaths or affirmations of the said Constable, or other credible persons, or by any other lawful ways and means, inform themselves what persons and estates in their respective Counties are rateable by virtue of this Act; and shall forthwith equally and impartially assess themselves, and all others rateable as aforesaid; (with certain exemptions) * * *

IX. And be it further enacted, That the said Assessors shall, at the return of the Commissioners precepts above mentioned, divide the Counties wherein they act into Districts, and appoint some fit person in every of those districts to be Collector of the said Assessments from time to time, and shall cause fair duplicates of the assessment of each district to be drawn; one part thereof shall by the Clerk, that writes the same, be delivered to one of the said Commissioners of the proper county, and the other part to the Collector of each district, with directions from the said Commissioners to every such Collector, inforsed on his duplicate or annexed thereunto, requiring him to demand of the parties the respective sums of money wherewith they are chargeable and acquaint them

with the day of appeal, which shall be appointed by the said Commissioners within one month after the said assessments are made; but where any of the said Collectors cannot meet with the party of whom demand is to be made as aforesaid, he or they shall leave notice in writing, with some of the family, or at the place of the party's last abode, signifying also the day of appeal; at which day every of the said Collectors shall return their said duplicates, with the names of such persons and value of such estates as shall be concealed, under-valued or omitted in the Constable's return.

XIII. And the said Commissioners shall cause their clerks to draw fair duplicates of the assessments of the said respective districts, so rectified as aforesaid, and deliver them to the Collector of those districts where they belong, within twenty days after the said day of appeal, with a warrant annexed thereunto, under the hand and seal of one or more of the Commissioners who signed the assessments, requiring them forthwith to collect and receive, from the persons assessed the several sums in the said duplicates respectively mentioned; either in ready money, etc. * * *"

Due Process of Law Forbids Holding the Agent for the Principal's Franchise Taxes.

The attention of the court is called to a statement made in the brief for defendant in error that after the report in which liability is predicated was made by the Illinois Central Railroad Company as agent of Harriman to the Auditor of Public Accounts "it remained on file in his office until January 20, 1898, when the assessment for franchise tax was made upon precisely the figures fixed by the railroad company."

It will be observed that the time of this assessment was long after the sale of the property of the Chesapeake Company to the New Orleans Company and at a time when it was forbidden by law to assess the purchaser, the New Orleans Company, for these taxes. The extraordinary device has been hit upon of an assessment of the Chesapeake Company—not the Illinois Company and a personal liability for the tax, not on the part of the Chesapeake Company or of the New Orleans Company who purchased the property, but of the Illinois Company which happened to be operating the property at the time as the agent of Harriman, and which has never owned the property at any time, and against which no assessment was ever made upon the basis of this report.

Sec. 4077 of Barbour & Carroll's statutes provides:

> "Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace or car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the

state, and a local tax thereon to the county, incorporated city, town and taxing district, *where its franchise may be exercised.*"

It is very evident from this passage that if the franchise exercised was that of the Chesapeake Company, the obligation to pay the taxes was upon that company. This appears the more clearly from Sec. 4078, where the return for purposes of franchise taxation is required to show "the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this state, and the fair cash value thereof." Obviously this information in the case of Chesapeake Company is a very different thing from the same information in the case of the Illinois Company.

In addition to this, under Sec. 4079 information is required to be given showing the entire property owned by the corporation outside the state and its gross and net income or earnings received outside the state as well as inside the state.

Since, as stated by the defendant in error, the Chesapeake Company owned and operated a line of railroad extending from Louisville, Kentucky, to Memphis, Tennessee, while the Illinois Company owned a line of railroad extending from the Missouri River to Chicago and from Chicago to New Orleans, with branches in many states, the franchise taxes of the two companies in Kentucky under these statutes would be fundamentally different in amount and quality. The Illinois Company has been assessed and has paid its tax. Now in addition thereto, to require it to pay the franchise tax of another corporation assessed against such other corporation, if against anyone, is to deprive the Illinois Company of its property without due process of law. To require the Chesapeake Company to pay its own franchise tax would be obviously a very different thing.

In the brief for defendant in error much reliance is placed upon Sec. 4086 of Barbour and Carroll's statutes, as follows:

> "All corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay all the taxes due the state from them into the treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided."

The meaning of this is perfectly obvious and means that the corporations which are required to make reports shall pay their taxes to the state. It does not mean that one corporation shall pay another's taxes. There is nothing in this passage to

indicate that the agent in making the report should pay the taxes of the principal or that one corporation should pay the taxes of another.

We claim that the Illinois Company is not liable to pay an assessment against the Chesapeake Company which neither owned, controlled, leased or operated a railroad in the state at the time the tax was attempted to be imposed.

Sec. 4086 does not impose upon a corporation the obligation to pay any taxes unless that corporation is assessed. We make the point that the Illinois Company has never been assessed.

The attention of the court is especially called to the fact that the franchise tax of the Chesapeake Co. including as it does all of the intangible property of that company, necessarily includes a tax upon the good-will of the Chesapeake Co. This good-will includes the habit of shippers to use the line, the habit of other railroad companies to give it traffic, the credit arising from having met past obligations, the value of all the stocks, bonds, choses in action, accounts, contracts and securities,—in short, the good-will is the most precious, the most valuable and the most generally inclusive of all of the intangible property of a railroad company. This good-will of the Chesapeake Co., would have been assessed in Kentucky upon a basis of the Kentucky mileage as compared to the entire mileage of the Chesapeake Co. which extended from Louisville, Kentucky, to Memphis, Tennessee. It is obvious that as to much of this particular intangible value of good-will the Illinois Company in the na-

ture of things was not, and could never be, even figuratively speaking, in possession.

If now the Illinois Company began to operate the same railroad, the taxable franchise value would be based upon the good-will of the Illinois Company, the traffic which it commanded at either end of the line, the habit of shippers to deal with the Illinois Central Railroad Company, the accumulated credit based upon the Illinois Company having punctually met its obligations in the past. Obviously, no company but the Illinois Company could be, even figuratively speaking, in possession of this valuable intangible asset.

Is it not obvious then that when the Illinois Company which operated the line as the agent of the owner Harriman is taxed upon the good-will of the Chesapeake Co., that it is being taxed upon something of which it was never in possession, could not be in possession in the nature of things, and as to which it would have no remedy over in case of the payment of the tax. All of the reasoning derived from the cases of possession by the bailee of personal property, or by an agent of real property of his principal, necessarily fails in the present case, because there is no possession, no lien, and no possible way of recoupment by the Illinois Company as against the Chesapeake Co. The Illinois Central Railroad Company operated the railroad as the agent of Harriman, not as the agent of the Chesapeake Co.

This is not at all a case where the agent in possession of property has an assessment made against

him. In such a case if there is a law making such an agent liable and if the law gives him a lien for his reimbursement as against his principal, such an assessment may very well be valid. The liability is one imposed by pre-existing law, of which the agent must take notice, and he is protected by his lien against his principal. The present case, however, is one of an assessment, not of the agent, the Illinois company, nor of the principal, Harriman, but of a third party, the Chesapeake Co. The nature of the agency is disclosed by the record. How can the Illinois company be held liable on an assessment against the Chesapeake Co.? If it were liable, what lien would it have for its reimbursement? The Chesapeake Co. was not only insolvent, but was not the owner of the railroad at the time of the assessment. The judgment below simply despoils the Illinois company of its property and gives it to the State of Kentucky and leaves the Illinois company without any remedy against any person whatsoever.

The assessment, if any, is against the Chesapeake Company. The Illinois Company was never the agent of this company so far as operating the property was concerned. It was agent only for the purpose of making the report of the Chesapeake Company. Even supposing that if the Illinois Company had operated the railroad as agent of the Chesapeake Company, the Illinois Company could have been subjected to the payment of the franchise tax of the Chesapeake Company, it is submitted that an agent who makes a report on behalf of another cor-

poration does not thereby subject himself to personal liability to pay the franchise tax of that corporation. There was nothing unlawful in the Illinois Company making this report, since the law authorizes the report to be made by an agent. Beyond agency in making the report in question, the Illinois Company was not the agent of the Chesapeake Company in any respect. The actual ownership of the property was a matter of public record in the courts of the United States and in the record of deeds of the various counties.

We claim that under these circumstances to impose a liability for the franchise tax of another corporation, not the owner of the property, at the time the tax accrued, is a deprivation of property without due process of law. It is no answer to this to say that the Illinois Company as agent made a return of the franchise tax of the Chesapeake Co. Such a return was required under heavy penalties and the only safe course to take was to make the return, but since, as shown by the published records, the title of that company had passed away, it is very questionable whether any franchise tax at all should have been assessed against the Chesapeake Co. If, however, a tax was due it was due from the Chesapeake Co. and could not constitutionally be exacted from this defendant. We submit that to require the Illinois Company to pay the franchise tax of the Chesapeake Co., which was at the time the tax accrued neither the owner nor the possessor of the railroad in question, is a deprivation of property without due process of law. There is absolutely no link by which

to fasten the liability of the Chesapeake Co. on the Illinois Co.

While it is true that a state under some circumstances may by statute impose liability for taxes upon the person in possession, as in *Carstairs* v. *Cochran,* 193 U. S., 10; *Thompson* v. *Ky.,* 209 U. S., 340; *Hannis Dist. Co.* v. *Baltimore,* 217 U. S., 285, affording such person the right of re-imbursement from the real tax-debtor as did the Kentucky Statute providing for the warehouseman's paying the taxes upon whiskey stored, nevertheless there is no such case here. The exigency of the case of spirits in government warehouses makes a basis for the distinction. The government has a lien upon spirits in government warehouses superior to all other liens and Federal laws virtually prevent the enforcement in the usual ways by state agencies of the collection of state taxes. In such cases the agent himself is assessed, and has an effectual remedy for his protection.

Our opponent's contention on this point is refuted by the merest consideration of the statutes which he cites. His claim is that *Sec.* 4086, Ky. Stats., makes liable the Illinois company in providing:

"All the corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay all the taxes due the state," &c., &c., and he remarks that the Illinois company made the report September 15, 1896; but the statute does not make liable the person making such report but makes liable "all corporations and other persons who are *required* to make reports." (Italics ours.)

The requirement for reports is found in *Sec.* 4078 as follows:

> "In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, shall annually, * * * make and deliver to the Auditor of Public Accounts of this state a statement * * * showing the following facts, viz.: the name and principal place of business of the corporation, company or association;" &c., &c.

The corporations here referred to as those "mentioned in the next preceding section" are the corporations enumerated, viz.:

> "Every railway company or corporation * * * also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised."

Obviously, the franchise tax created by *Sec.* 4077 is upon the franchise of the railroad company owning the railroad, for the tax is declared to be "in addition to the other taxes imposed on it by law" and such "other taxes" are the taxes upon the tangible property, railroad, rolling stock, &c., *see Sec.* 4096.

It results, therefore, that it is the company taxed by *Section* 4077 that is required by *Section* 4078 to report, and required by *Section* 4086 to pay the taxes due the state. There is no suggestion that any other person shall pay them. The words are,

as above quoted, "all corporations and other persons who are required to make reports," etc.

Not only was the Chesapeake Company or Harriman the person required to report (*Section* 4078), and, accordingly, required to pay the taxes, but the Commonwealth thoroughly understood this not only when it filed its original, but also when it filed its amended petition for in its original petition it sought a judgment *in personam* against the Illinois Company upon the ground that (Rec., 2):

> "The defendant, Illinois Central Railroad Company, by some contract between itself and its co-defendant, or the stockholders of its co-defendant, the exact terms of which are unknown to this plaintiff, acquired possession of the property of the said defendant Chesapeake, Ohio & South Western Railroad Company, and as a partial consideration for said acquisition covenanted to pay to the Commonwealth all taxes accrued or accruing for which the said Chesapeake, Ohio & South Western Railroad Company was or was to be liable, together with the interest and penalties upon same;"

and in its amended petition (Rec., 6) it retracted the allegation thus quoted and claimed a lien upon the railroad and franchises of the Chesapeake Company and, among other things, alleged that "the defendant, the Illinois Central Railroad Company, in behalf of the Chesapeake & Ohio South Western Railroad Company made to the Auditor of Public Accounts a report for franchise tax purposes of the Chesapeake & Ohio South Western Railroad Company."

The report itself shows (Rec., 22) that it was the

report of the Chesapeake, and not of the Illinois Company for it is entitled:

> "Report of the Chesapeake & Ohio South Western Railroad Co. (operated by Illinois Central Railroad Company, agent,) to the Auditor of Public Accounts of Kentucky, Sept. 15, 1896."

It thus appears without possibility of contradiction that the Chesapeake Company or Harriman was the person meant by *Section* 4077, 4078 *and* 4086, and that the Commonwealth so understood when it filed its original petition and its amended petition, and that in this the Commonwealth is corroborated by the report itself which shows that it was the report of the Chesapeake Company and not of the Illinois Company. The claim of our opponent, therefore, that the Illinois Company is made liable by *Section* 4086 because it made the report "in behalf of the Chesapeake, Ohio & South Western Railroad Company" is not maintainable for, as aforesaid, the report was, and by the Commonwealth was recognized to be, the report of the *Chesapeake Company.*

Judgment in Personam is Beyond the Commonwealth's Claim and the Court's Jurisdiction and, Consequently, a Deprival of Due Process.

Even if the statute had provided for the assessment against the Illinois Company upon the ground that such company was in possession as agent, it is not claimed, as is above shown, that there was any such assessment, but the Commonwealth, as is above shown, alleged both in its petition and amended pe-

tition (Rec., 2, 6, 7) that the *Chesapeake Company* was assessed a franchise tax, and in the original petition asserted the Illinois Company's liability upon the ground that it had, for a consideration, *agreed to pay* the tax for which *the Chesapeake Company was liable,* an allegation afterward withdrawn and stricken from the pleadings. Independently, however, of all the foregoing propositions, plaintiff in error is entitled to prevail because it was denied *due process* by the judgment against it *in personam* when the Commonwealth in its pleadings claimed only an enforcement of the lien upon the property of the *Chesapeake Company,* and expressly disclaimed in its amended petition the claim of personal liability of plaintiff in error which it had asserted.

We fully recognize that, generally, questions of the sufficiency of pleadings are not questions of *due process;* and that, generally, declarations at law and bills in equity may be demurrable and, notwithstanding, jurisdiction be complete and the judgment, although erroneous, be not void. Nevertheless, judgments may be so unauthorized by the proceedings upon which they are based that the courts are without jurisdiction to render them. This court has persistently declined to promulgate a comprehensive definition of *due process,* but has consistently required an opportunity for hearing, and for a hearing according to the established course of procedure, and it is demonstrable from the decisions of this court and other courts that plaintiff in error has been denied such a hearing in this case.

The judgment under review is a judgment *in*

personam against plaintiff in error, the Illinois Company, upon the ground that "it was in possession of the property and made the report upon which the assessment was made." (Rec., 60.) This question was never tried, and the Commonwealth must have been as much surprised at such a judgment as plaintiff in error was. It was nowhere claimed either in the Commonwealth's *original,* or in its *amended* petition that the Illinois Company was liable *in personam, except in the claim which was retracted, and was, therefore, never afterward for trial,* that (Rec., 2):

> "The defendant, Illinois Central Railroad Company, by some contract between itself and its co-defendant, or the stockholders of its co-defendant, the exact terms of which are unknown to this plaintiff, acquired possession of the property of the said defendant Chesapeake, Ohio & South Western Railroad Company, and as a partial consideration for said acquisition covenanted to pay to the Commonwealth all taxes accrued or accruing for which the Chesapeake, Ohio & South Western Railroad Company was or was to be liable."

Upon this allegation the Commonwealth prayed judgment against the Illinois Company. (Rec., 3.)

As aforesaid, however, the Commonwealth did not adhere to the claim for judgment *in personam* against the Illinois Company, but emphatically retracted the allegation upon which such judgment had been claimed, saying (Rec., 6):

> "That is was in error in alleging in the first paragraph of its original petition that the defendant, the Illinois Central Railroad Company, by some contract between itself and its co-de-

fendant or the stockholders of its co-defendant acquired possession of the property of the said Chesapeake, Ohio & Southwestern Railroad Company, and as a partial consideration for said acquisition covenanted to pay to the Commonwealth all taxes accrued or accruing for which the Chesapeake, Ohio & South Western Railroad Company was or was to be liable, together with the interest and penalties upon same. The plaintiff now prays that said allegations may be stricken from the original petition, and in lieu thereof it now asserts: That after the defendant Chesapeake & Ohio Southwestern Railroad Company had made the report set out in the first pragraph of plaintiff's original petition and when the property of the said Chesapeake & Ohio South Western Railroad Company was in lieu to this plaintiff for its taxes, one Edward H. Harriman became the purchaser of said property by some contract to the plaintiff now unknown, and afterwards, to wit, on the 19th day of August, 1896, the said Edward H. Harriman, transferred the property of the Chesapeake & Ohio Southwestern Railroad Company to the Illinois Central Railroad Company by an instrument of writing, a copy of which is now filed herewith as part hereof marked 'A.'

And now plaintiff states further that by virtue of the assessment of the franchise of the Chesapeake & Ohio Southwestern Railroad Company as set out in paragraph one of its original petition, it, this plaintiff acquired a lien upon the assets, tangible and intangible, of the Chesapeake & Ohio Southwestern Railroad Company, for taxes upon defendant's franchise, for interest and for penalty upon same; which lien plaintiff is advised and now states is a subsisting lien upon said property in the hands of the Illinois Central Railroad Company."

The Commonwealth alleges that after the execution of Exhibit "A" and while the property of the

Chesapeake Company was being operated by the Illinois Company, "the defendant, the Illinois Central Railroad Company in behalf of the Chesapeake & Ohio Southwestern Railroad Company made to the Auditor of Public Accounts a report for franchise tax purposes of the Chesapeake & Ohio Southwestern Railroad Company," and prays as follows (Rec., 7):

> "And having amended its original petition, it prays for an enforcement of its lien for the amount set out in its original petition, for costs, penalties and for all proper relief."

Nothing could be plainer than the fact that the Commonwealth in its amended petition just noted withdrew its claim for judgment *in personam* against the Illinois Company *and in lieu thereof* asserted a lien upon the franchise and property of the Chesapeake Company in the hands of the Illinois Company. To render judgment *in personam* against the Illinois Company was, therefore, *as violative of due process* as if it had been rendered *without any claim ever having been made.* Indeed, to do so would be even more misleading if possible. The Illinois Company was by the amendment virtually told that all claim against it *personally* was withdrawn and that the Commonwealth would pursue its claim *in rem* for a lien upon the Chesapeake Company's franchise and property only.

Moreover, the Commonwealth had been consistent in the claim that the taxes claimed were those assessed upon the franchise of the *Chesapeake Company* and for which that company was liable, and the only claim against the Illinois Company

in personam ever intimated was the claim which the Commonwealth declared had been asserted through "error" and which was, accordingly, retracted. A judgment against the Illinois Company *in personam* was, therefore, as emphatically a judgment without a hearing as if no trial had been had. After the amended petition the Commonwealth's claim and the defendant's defense embraced solely the claim of lien upon the Chesapeake Company's franchise and property then operated by the Illinois Company. The Commonwealth's claim thereafter was a claim *against the property of another,* and not a claim against the *Illinois Company at all.* The Illinois Company was no longer sued, but another, or another's property was sued. The judgment against the Illinois Company was, therefore, without legal procedure, or *due process.*

In this predicament, plaintiff in error is as thoroughly protected by the requirement of due process as if jurisdiction were lacking for any other reason. It is laid down in 1 Black, Judg., Sec. 242, as follows:

> "Besides jurisdiction of the person of the defendant and of the general subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. In other words, a judgment which passes upon matters entirely outside the issue raised in the record is so far invalid."

Again:

> "A defect in a judgment arising from the fact that the matter decided was not embraced

within the issue has not, it would seem, received much judicial consideration. And yet I can not doubt that, upon general principles, such a defect must avoid a judgment."

In illustration of his doctrine, he says:

"If, in an ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substances of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present, the single but fatal flaw having been the absence from the record of any issue on the point determined."

Again he says:

"A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard."

Many authorities are cited in support of the text. In *Munday* v. *Vail*, 34 N. J. Law, 418, it was held:

"A decree on any question which is entirely outside of the issues raised in the record is invalid, and will be treated as a nullity, even in a collateral proceeding."

The New Jersey court held that jurisdiction was dependent upon the general cognizance of the subject-matter, presence of the parties and the inclusion of the point in the issues.

In *Reynolds* v. *Stockton*, 43 N. J. Eq., 211 (10 Atl. R.), 385, the facts and points involved were very

similar to those now presented. The complainant in his complaint in a New York court claimed a fund, and the right to the fund was the only question raised by the pleadings, and the court rendered personal judgment against one of the parties, and it was treated in a New Jersey court as a nullity, because not within any issue raised by the pleadings in the New York court. The judgment of the New Jersey court was affirmed by this court in 140 U. S., 254, this court saying on this point:

> "In order to give a judgment rendered even by a court of general jurisdiction the merit and finality of an adjudication between the parties, it must be responsive to issues tendered by the pleadings."

We shall notice this court's decisions later. There are cases in the state courts denying the right to a judgment which is outside the issues, where the question arose upon appeal, and where, therefore, the Federal question of jurisdiction and due process did not arise, *e. g., Husted* v. *Vanness,* 158 N. Y., 154, 52 N. E., 645; *Burns, etc., Co.* v. *Doyle,* 71 Conn., 742, 71 Am. St. Rep., 237; *Lincoln Bank* v. *Virgin,* 36 Neb., 735, 55 N. W. Rep., 218, 38 Am. St., 747; *Carter* v. *Gibson,* 47 Neb., 655, 66 N. W. Rep., 631.

In *Seamster* v. *Blackstock,* 83 Va., 232, 5 Am. St. Rep., 262, the judgment was held void because it exceeded the court's jurisdiction. The sole object of the suit was the assignment of a widow's dower, but the court not only decreed such assignment, but apparently *sua sponte* decreed sale of the residue of the land. The judgment was attacked collaterally and the court held that the judgment was void where

in excess of jurisdiction, saying that though a court might obtain jurisdiction rightfully, "yet its decree may be void, because in the progress of the cause, it has exceeded its jurisdiction. The adjudged cases furnish numerous examples of this kind."

Among the cases cited by the Virgina court were *Wade* v. *Hancock,* 76 Va., 620, and *Ex parte Lange,* 18 Wall., 163.

Process may or may not be "due process," and a judgment may be erroneous and still may or may not constitute "due process." This court said in *Ex parte Lange* (18 Wall., 175):

> "A judgment may be erroneous and not void, and it may be erroneous because it is void. The distinction between void and voidable adjudgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes."

Again this court said (page 176):

> "It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case."

This court, also, suggests the case of a justice of the peace, having jurisdiction of misdemeanors, ordering a prisoner hanged; saying that the judgment would simply be void "because he had no power to render such a judgment."

In *Windsor* v. *McVeigh,* 93 U. S., 274, this court held that judgment without hearing was not entitled to respect of any other tribunal.

This court said (page 282):

"The doctrine invoked by counsel that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, can not be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction."

Also said (page 282):

"Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and can not then transcend the power conferred by law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court can not order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * *

The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in these cases." Citing *ex parte Lange, supra,* and *Bigelow* v. *Forrest.*

Again, this court said (page 283):

"It was not within the power of the jurisdiction of the district court to proceed with the case, so as to affect the rights of the owner after his

> appearance had been stricken out, and the benefit of the citation to him thus denied, for jurisdiction is the right to hear and determine; not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard and, therefore, could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction."

This salutary doctrine so happily expounded by this court is exactly applicable here, for after the Commonwealth withdrew its claim for a judgment *in personam* against plaintiff in error, and retracted the allegations upon which it had originally founded such claim, a judgment *in personam* was as devoid of due process as was the judgment in *Windsor* v. *McVeigh* after the owner's appearance was stricken from the record.

Likewise, exactly in point, is the decision, and the exposition of the grounds therefor, in the great case of *Hovey* v. *Elliott*, 167 U. S., 409, where the learning on the subject is fully expounded. The question determined was the right to pronounce a decree *pro confesso* after striking defendant's answer from the record because of its contempt.

In *Hovey* v. *Elliott*, this court re-affirmed *Windsor* v. *McVeigh*, and applied the principles there expounded and added (p. 415):

> "This language but expresses the most elementary conception of the judicial function. At common law no man was condemned without being afforded opportunity to be heard," citing Coke in his commentary on Magna Charta and ~~refuted~~ reviewing the English cases and the previous de-

cisions of this court and other courts. The conclusion of this court was (p. 444):

"It cannot be doubted that where a judgment is rendered without the issuance and service of summons against a party who did not enter an appearance, the court rendering it is without jurisdiction to do so, and it can be assailed as void whenever presented as a muniment of right against another. Looking at the substance and not the form of the decree in the case of *Hovey* v. *McDonald,* upon which the rights of the plaintiff in error depend, it is plain that the judgment was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear or to be heard in his defense? As said by this court in *Adams* v. *Postal Telegraph Cable Co.,* 155 U. S., 689, 698: 'The substance and not the shadow determines the validity of the exercise of the power.'"

The case at bar is within the principle of the decision in *Windsor* v. *McVeigh, supra.* It is also controlled by the decision in *Reynolds* v. *Stockton,* 140 U. S., 254.

Reynolds v. *Stockton,* 140 U. S., 254, invoked in *Hovey* v. *Elliott,* is next to conclusive of our right to a reversal for the principle for which we contend was therein expounded by this court in the most emphatic terms. The exact question involved was the faith and credit due to the New York judgment against the receiver and this court, affirming the New Jersey court, held that such judgment was outside the prayer of the complaint and the issues presented by the pleadings and, therefore, void. It was

void because the court was without jurisdiction and, therefore, acted in excess of due process.

This court said (page 264):

> "We are of opinion that the decision of the Chancery Court of New Jersey, as sustained by the Court of Errors and Appeals of that state, is correct, and must be affirmed. The first and obvious reason is that the judgment of the Supreme Court of New York was not responsive to the issues presented."

Also said, concerning Art. IV, Sec. I, Federal const.:

> "It does not demand that a judgment rendered in a court of one state, without the jurisdiction of the person, shall be recognized by the courts of another state as valid, or that a judgment rendered by a court which has jurisdiction of the person, but which is in no way responsive to the issues tendered by the pleadings and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state. The requirements of that section are fulfilled when a judgment rendered in a court of one state, which has jurisdiction of the subject-matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another state."

Again says (page 265):

> "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted."

In *Reynolds* v. *Stockton*, this court remarked that the case did not involve an instance of a matter actually litigated although not put in issue, and the same observation is equally applicable in the *instant case*, because the entire litigation in the Kentucky court occurred after the Commonwealth withdrew its allegations and prayer for personal judgment and asserted only a claim for enforcement of a lien upon the property of another.

A case involving the principle now under discussion is *Wetmore* v. *Karrick*, 205 U. S., 141, where this court held that after the expiration of the term of court wherein the judgment was rendered, all proceedings were a nullity, because taken without the constitutional hearing required by due process.

Thus we have in *Windsor* v. *McVeigh* a case where this court denied the right of a court to pronounce judgment after striking the owner's appearance from the record; in *Hovey* v. *Elliott*, a case where this court denied the right to take a bill *pro confesso* after striking the defendant's answer because of his contempt; in *Reynolds* v. *Stockton*, a case where it denied the right to pronounce a judgment, or decree, that was not responsive to the issues presented, and in *Wetmore* v. *Karrick*, a case where it denied the right to take proceedings after the litigants were dismissed from attendance upon court by expiration of the term wherein the judgment was rendered, the principle ruled in all the cases being the obligation to accord the litigant not only notice but full opportunity to be heard. Clearly, then, it is as unauthorized, and equally de-

nies due process, to pronounce judgment *in personam* against a defendant when no relief is claimed against it by its adversary except the enforcement of a lien upon the property of another person in its possession. *Reynolds* v. *Stockton* has been often applied in the lower Federal Courts, but, of course, obtains no sanction therefrom except when applied by this court.

In *Lutcher & Moore Lumber Company* v. *William H. Knight,* 30 Sup. Ct. Rep., 505, the point decided has been stated as follows:

> "Plaintiffs in error in a Federal circuit court of appeals are substantially denied their day in court by an affirmance of the judgment below on the ground that the defenses relied upon were of an equitable nature, not cognizable in a court of law, where the trial court, with the acquiescence of all parties, treated the defenses interposed by the answer as legal in their nature, and no such question was raised by either party or considered when the cause was submitted to the Circuit Court of Appeals."

In the opinion of the court Mr. Justice White said (509):

> "Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."

In the case below we also did not get our day in court, since by the pleadings and evidence there was no case for a personal judgment against the Illinois

Central pleaded or heard in the court of first instance.

It is probably unnecessary to cite cases expounding the general features of due process. This court's reports are full of them. The first element of due process is jurisdiction in the tribunal assuming to adjudicate, and, as we have seen, this jurisdiction is not satisfied by general cognizance of the subject-matter involved, but requires that the thing adjudicated be within the issues presented by the pleadings.

Furthermore, due process requires, as we have seen from this court's decisions, a proceednig according to established methods. Consequently, although a court might have general jurisdiction of the subject-matter and of the parties, it could not constitutionally proceed summarily, but must proceed by action or suit.

The fundamental ground for repudiating the action of a court in the cases instanced is that the litigant condemned in his person or his property is not called on to try the question which the court assumes to determine. Thus, as suggested by this court, judgment, as if in ejectment, could not be rendered in an action of replevin although the court had general jurisdiction to try either or both actions, and had all necessary parties in court. Nor could a court constitutionally render judgment *in personam* against the holder of a fund when the complaint called only for the trial of the title or right to the fund.

The reason for denying sanction to the judgment in such cases is not that the parties are not in court,

but that they are there to try questions other than those which the judgment assumes to determine.

Plainiff in error, the Illinois Co., after the amendment of the Commonwealth's petition (or complaint) was in court solely upon the Commonwealth's claim of a lien upon the railroad and franchises in possession of plaintiff in error; it was not in court on any question of assessment for taxes of its franchise, nor of any liability *in personam* for any taxes assessed or assessable against the franchise of the Chesapeake Co., but it was in court solely on the question of the Commonwealth's right to enforce a lien upon the Chesapeake Co.'s property.

On the right of foreclosure the questions were radically different from those on the right to a judgment *in personam* against plaintiff in error. On the right to foreclose arose the question, for example, of the sufficiency of the "amended petition in equity" (Rec., 6) which, even when taken in connection with the original petition, did not describe any property which could be sold at foreclosure. The questions of assessment arose, of course, but the question was of an assessment of the owner of the railroad and not of the agent who operated it. Plaintiff in error, called to defend a claim of lien on the property in its possession, was not called upon to defend a claim of judgment *in personam* against it. The claim to judgment *in personam* had been asserted, but had been emphatically withdrawn. It no longer existed. It was based upon allegations which the Commonwealth had craved should be stricken from its petition. The Commonwealth had virtually declared

that the considerations upon which it had claimed a judgment *in personam* against the plaintiff in error were unfounded, had been asserted through mistake, and were, accordingly, retracted. A judgment *in personam* rendered by the State Court upon such a record was, therefore, rendered without a hearing and offended all the requirements of due process so often announced by this court in the cases cited and many others.

Indeed, upon the record, as it stood at trial, the Commonwealth, as above said, must have been as greatly surprised by the judgment *in personam* as was the plaintiff in error. The Commonwealth would indeed be self-stultified to claim otherwise in view of its amended petition withdrawing its claim and substituting a claim of foreclosure of a lien upon the property of another.

CONCLUSION.

Craving the indulgence of the court upon the length of this brief, we submit that judgment *in personam* was rendered against plaintiff in error in the absence of an assessment, the first step in due process in tax proceedings, that there was no assessment of the taxes for which judgment was rendered and that the Taxing Board never intended an assessment by the envelope *memoranda* upon which an assessment was claimed by the Commonwealth; that such a paper does not constitute a record such as is necessary to due process of law in assessing a tax based upon valuation; that plaintiff in error was adjudicated to pay a tax which no other railroad in Kentucky was required to pay and, consequently, was denied the equal protection of the laws, and taxed by a method more burdensome than other railroad companies were taxed; that plaintiff in error was a mere agent in making a report and that as such no liability was even claimed against it in the Commonwealth's pleadings; and that judgment *in personam* was finally rendered against plaintiff in error when no claim therefor even existed in the Commonwealth's pleadings. The judgment of the State Court, consequently, offends fundamental principles of law and so flagrantly as to violate the requirements of due process of law and the equal protection of the

laws enjoined by the Fourteenth Amendment of the Constitution of the United States, and should be reversed; which is respectfully prayed.

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APPENDIX.

Kentucky Statutes.

SEC. 4021. The Commonwealth, and each county, incorporated city, town or taxing district, shall have a lien on the property assessed for the taxes due them respectively (for five years) which shall not be defeated by gift, devise, sale, alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale. When any lands or improvements shall not be assessed in any one year, it may be assessed retrospectively in the manner provided for by law, for that year, at any time not later than five years thereafter; but the lien thereby accruing shall not prejudice the rights of purchasers acquired in the meantime.

SEC. 4077. Every railway company or corporation, and guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special

or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised. The Auditor, Treasurer, and Secretary of State are hereby constituted a Board of valuation and Assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in Section 1 of Subdivision 4 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require. It shall be the duty of the Attorney-General, when requested by the Board of Valuation and Assessment, to attend said board at its meetings and advise with same in its proceedings.

SEC. 4078. In order to determine the value of the franchises mentioned in the next preceding section, shall annually, between the thirtieth day of June and the first day of October, make and deliver to the Auditor of Public Accounts of this State, a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such

the corporations, companies and associations mentioned in the next preceding section

form as the Auditor may prescribe, showing the following facts, viz.: the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

SEC. 4079. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company

or association be organized under the laws of any other State or government or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchise to be taxed, the said board may excuse the officer from answering such questions: *Provided,* That said board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

SEC. 4081. If the corporation organized under the laws of this State, or of some other State government, be a railroad, telegraph, telephone, express,

sleeping, dining, palace or chair car company or a corporation performing any other public service, the lines of which extend beyond the limits of the State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this State; but if any such railroad or other corporation organized under the laws of this State have all of its lines outside of this State, the said board shall fix the value of its entire capital stock as hereinbefore provided, and apportion to this State for taxation therein the proper proportion and not less than one per cent. of its said capital stock, and the amount so apportioned shall be the value of its intangible property, including its corporate franchise, stocks, bonds, securities and choses in action, subject to taxation in this State and in the county, city, town and district where its principal place of business in this State may be located.

SEC. 4086. All corporations and other persons who are required to make reports to the Auditor of

Public Accounts shall pay all taxes due the State from them into the treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided.

SEC. 4096. That the president or chief officer of each railroad company, or other corporation owning or operating a railroad line, in whole or in part, in this State, and all railroad bridge companies owning or operating the bridge spanning a river constituting the boundary of this State shall, on or before the first of August in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, incorporated town and taxing district therein, together with the average value per mile thereof, and in the respective counties, cities, incorporated towns and taxing districts therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars, and a list of the depot grounds and improvements, and other real estate of the said company, and the value thereof, and the respective counties, cities and incorporated towns in which the same are located. That if any of said railroad companies own or operate a railroad or railroads out of this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad

in this State bears to the whole number of miles operated by said company in and out of this State. Said report shall be made as of the first day of July, and a failure to file said report by the first day of August shall subject the president or chief officer residing in this State to a fine of one thousand dollars, and fifty dollars for every day after the first day of August that he fails to file said report, to be recovered as indicated by Section 9 of this article.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 16.

ILLINOIS CENTRAL RAILROAD COMPANY, *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY, - *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

T. L. EDELEN,
For Defendant in Error.

Of Counsel:
JAMES BREATHITT,
Attorney-General of the Commonwealth of Kentucky.
ROBT. B. FRANKLIN,
CLEM J. WHITTEMORE,

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 186.

OCTOBER TERM, 1909.

No. 186.

ILLINOIS CENTRAL RAILROAD COMPANY, - *Plaintiff in Error,*

versus

COMMONWEALTH OF KENTUCKY, - - *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

May it please Your Honors:

This was an action by the Commonwealth of Kentucky in the fiscal court of that State to recover of the plaintiff in error and Chesapeake, Ohio & Southwestern Railroad Company certain franchise taxes which had accrued to the Commonwealth against the latter company for the years 1895 and 1896. The constitutional and statutory provisions controlling the cause of action are as follows:

Section 174 of the Constitution of the State provides:

> "All property, whether owned by natural persons or corporations, shall be taxed in proportion to

its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises."

Section 181 of the Constitution further provides:

"The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

Section 4077 of Barbour and Carroll's Statutes provided:

"Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privi-

lege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section four thousand and ninety-five of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require."

Section 4078 was as follows:

"In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section four thousand and ninety-two of this article, shall anually, between the fifteenth day of September and first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, pre-

ferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require."

Section 4079 is in this language:

"Where the line or lines of any such corporation, company or association extend beyond the limits of the State, or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association

in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: *Provided,* That said board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid."

Section 4086 was in this language:

"All corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay all the taxes due the State from them into the Treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided."

Chesapeake, Ohio & Southwestern Railroad Company owned and operated a line of railroad extending from Louisville, Kentucky, to Memphis, Tennessee. This road was sold at judicial sale in the summer of 1896 and was purchased by one Edward H. Harriman. On the 19th day of August, 1896, Harriman turned over this road to the Illinois Central Railroad Company under a gen-

eral power of attorney, including among other very general powers, "to demand, sue for and receive all the earnings of the said railroad, and all moneys which shall become due in respect of the business hereby entrusted to its charge, and to apply the same or so much thereof," as it may see fit, "to the payment of the necessary costs and expenses incurred in the management, maintenance and operation of the said railroad and other property" * * * "and generally to act as" * * * his "attorney or agent in relation to the premises and to do all acts and things in and about the premises as fully and effectually in all respects" as the grantor in the power of attorney might himself do. This power of attorney may be found at pages 8 and 9 of the record.

It is further recited in the said power of attorney that the plaintiff in error had, prior to the execution of said power of attorney, exercised the powers granted, and its previous exercise of those powers was specifically ratified by said power of attorney. On the 31st of October, 1896, the plaintiff in error made a report to the Auditor of Public Accounts of the Commonwealth, as of date September 15, 1896, giving specifically the information required by Section 4078 of the Kentucky Statutes, hereinbefore quoted. It will be observed that by Section 4079 the duty of making this report was specifically imposed upon corporations either owning, *operating,* leasing or *controlling* lines of railroad in the State of Kentucky. So that the plaintiff in error on the 15th day of September, 1896, was *operating* and *controlling* the properties of the Chesapeake, Ohio & Southwestern

Railroad Company, by virtue of a power of attorney from Harriman authorizing it to control and operate the said property and to pay out the receipts for the expenses of the road. By Section 4086, heretofore quoted, a personal obligation was imposed upon all corporations whose duty it was to make the report to pay the taxes which might be found due by the State Board of Valuation and Assessment.

It may be remarked in passing that the method of taxing railroad companies in Kentucky is generally that the tangible property is assessed for taxation by the Railroad Commission and the franchise of the railroad company is obtained by taking the sum total of its capital, called capital stock in the statutes, and from this deducting the value of the tangible property otherwise assessed. Foreign railroad companies whose lines extend partly in Kentucky and partly out are assessed in the same manner upon a proportional basis. When the State assessing officers reach a definite conclusion as to the value of the corporate franchise, notice is given by mail to the corporation affected, and it has thirty days within which to protest against any injustice done it by the proposed or tentative assessment. If no protest is made within that time, or if a protest having been made, it is disregarded, the tentative assessment, modified or unmodified, becomes the final assessment upon which the franchise tax is paid to the State at the same rate of taxation paid by other property of taxpayers. When the assessment has been made final for franchise purposes, it becomes the duty of the Auditor of Public

Accounts to certify to the local subdivisions of the State within which the franchise is exercised, counties, cities and taxing districts, the proportion to which each subdivision is entitled.

After the report, to which I have referred, was made by the Illinois Central Railroad Company to the Auditor of Public Accounts, it remained on file in his office until January 20, 1898, when the assessment for franchise tax was made upon precisely the figures fixed by the railroad company. By this report it appeared that the total capital of the Chesapeake, Ohio & Southwestern Railroad Company, operated by the Illinois Central Railroad Company, was $6,700,000, the tangible property was $4,753.339; by deducting one from the other the value of the franchise was found to be $1,946,661, upon which the tax was $10,219.97. No protest was made by the Illinois Central Railroad Company against this assessment, and on the 21st of February, 1898, the tentative assessment thus made was made final.

By Section 4091 of the Kentucky Statutes it was provided as follows:

> "All taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company or association by the Auditor; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent per annum; any

such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction."

The Chesapeake, Ohio & Southwestern Railroad Company and the Illinois Central Railroad Company having failed to pay the assessment, this action was brought for the recovery of the tax and penalty provided for by the sections of the statutes which I have quoted.

By the original petition it was alleged that the assessments were made of the Chesapeake, Ohio & Southwestern Railroad Company, and by some contract the Illinois Central had taken possession of the property assuming to pay the assessed taxes. The prayer of the petition, or bill, was in this language:

"Wherefore the premises considered, the Commonwealth prays to recover judgment against both of said defendants for the sum of $10,219.97, for the further sum of $1,021.99 and for its costs herein expended."

The amended petition, or bill, made profert of the power of attorney hereinbefore referred to and alleged as follows:

"Second. The plaintiff amends said paragraph of its original petition herein and states: that after the execution and delivery of the written contract set out in paragraph one of this amendment, and while Chesapeake, Ohio & Southwestern Railroad Company was being operated by its co-defendant,

> the Illinois Central Railroad Company made to the Auditor of Public Accounts the report for franchise tax purposes of the Chesapeake, Ohio & Southwestern Railroad Company."

The plaintiff further prayed that its amended petition, or bill, be read into and as a substitute for the original petition, or bill, *so far as the two were inconsistent,* and thereupon it prayed as follows:

> "And having amended its original petition, it prays for the enforcement of its lien, for the amount set out in its original petition, for costs, penalties and for all proper relief."

There was no abandonment of any relief demanded by the original bill, but there was the further prayer for the enforcement of its lien upon the property of the Chesapeake, Ohio & Southwestern Railroad Company in aid of the personal judgment demanded by the original bill.

The answer to the petition, or bill, as amended, may be found at page 30 of the transcript. There is no allegation in that answer of any satisfaction of the claim or of any payment, nor is there any denial that the sssessment was made as specifically alleged in the bill as amended. No attempt was made to raise any federal question at all. No claim was asserted that the plaintiff's demand would take from the defendant, the Illinois Central Railroad Company, its property without due process of law. No pretense was advanced that any of the sections which I have quoted were violative either of the State or Federal constitutions, but the answer de-

nied that the report was made for the purpose alleged in the bill, and further pleaded the five-years statute of limitations in such cases made and provided. The lower court dismissed the first paragraph of the bill which sought to recover of the two defendants franchise taxes for the year 1895, and granted the relief as to taxes and penalty for the year 1896, and from that judgment the Illinois Central Railroad Company appealed to the Court of Appeals. The opinion of the court affirming the judgment may be found in 128 Kentucky at page 268. No Federal question was presented to that court until after the judgment had been affirmed. With a fertility of resource worthy of better cause, counsel in the petition for rehearing asserted for the first time that his client's rights were being taken from it without due process of law.

I have called the court's attention to the fact that the franchise assessment made for State purposes is the basis of the assessment for local purposes. After this assessment had been made against the Illinois Central Railroad Company for franchise taxes for the Chesapeake, Ohio & Southwestern Railroad Company, which it controlled and operated at the assessment period, the Auditor of Public Accounts was on the point of certifying to the counties, cities and taxing districts through which this road ran the assessment of January 20, 1898, for franchise taxes for the year 1896, and this plaintiff in error, with other railroad companies similarly situated, went into the fiscal court of the State wtih a bill in equity to enjoin the Auditor's action upon these as-

sessments upon the very matters of defense asserted in this case. It was represented by the same counsel. The fiscal court denied the injunction and the railroad companies appealed to the Court of Appeals, which affirmed the judgment of the lower court. The opinion may be found in 113 Kentucky at page 657. Counsel did not in that case claim that the assessment violated any rights which it held under the Constitution of Kentucky, though they do seem to have contended that the Fourteenth Amendment protected them from the franchise tax, because the law was not specifically enforced against some other corporations. It was not alleged in the answer in this case that other corporations similarly situated were exempted by the State officers from the payment of franchise taxes. There have been enough cases reported in the official reports of Kentucky and of this court to disprove the assertion, if any such had been made.

The plaintiff's assignment of errors, which may be found at page 80 of the printed transcript, embraces fifteen supposed errors. All of these in their ultimate analysis embrace but three complaints:

First—That the plaintiff in error was compelled to pay taxes when other railroads similarly situated escaped such payment.

Second—That a personal judgment was rendered against the Illinois Central Railroad Company when it did not own the railroad, the franchise of which was assessed.

Third—That there was no assessment, that is, no record of the assessment written down in a book kept for the purpose.

First, I may remark with reference to the first of these supposed errors that no such defense was interposed in the court below. The defendant's answer may be found at pages 30, 31 and 32 of the printed transcript, and there is not a word in that answer raising this defense, nor is there any word in the original answer, which may be found at page 5 of the printed transcript, making this defense.

Second, the statutes which I have quoted imposing upon companies which either own, operate or control railroads, the duty of making the report and the liability for the taxes found due upon the assessment, disposes of the second contention.

Third, the plaintiff filed with its petition an exhibit and proved the exhibit by testimony, showing an exact copy of the report made by the plaintiff in error, with the endorsements showing when the corporation was first notified of the tentative assessment, and when the final notice was sent out.

Indeed, Your Honors will find that the fact that this report was made pursuant to the statutes I have quoted and that assessment was made as alleged in the petition is not seriously controverted. The purpose of the assessing officers is much controverted, but the fact that they made the assessment and reported the fact to the corporation is abundantly proved by the testimony of the only member of the Board of Valuation and Assessment, who went on the witness stand and denied the legal effect of the action of the Board. That the notice of the assessment was sent to the Illinois Central is not seriously con-

troverted. The gravamen of the second point by plaintiff in error, therefore, is that the State assessing officers should have made their assessment in a well-bound book instead of endorsing it upon the jacket or envelope containing the report itself. It may be conceded, for the purpose of this discussion, that the system of bookkeeping was somewhat crude and unsatisfactory, but the fact remains that the report was made in accordance with the statutes; tht the report made by the railroad was adopted by the Board of Valuation and Assessment; and that the plaintiff in error was notified of this fact, and, nevertheless, although it made no protest, failed to pay the taxes. It follows as an inevitable *sequitur* from the report, the assessment and the notice.

A reading of the opinion of the Court of Appeals, which is copied into the printed transcript at page 58, will show that it was based chiefly upon two points: first, that after the assessment had become final, the testimony of the Auditor of Public Accounts was not competent to show that the Board of Valuation and Assessment did not intend the legal effect of their act, and that parol evidence was not competent to impugn an assessment regular on its face which had become final. A second point decided by the court was that the five-year statute of limitations was not applicable to the claim in suit. It thus appears that the liability of the plaintiff in error was predicated by the court below upon an assessment made pursuant to the report made under the mandatory provisions of the Kentucky Statutes, and

that no Federal question up to that time had ever occurred to counsel for the plaintiff in error at all.

From these considerations it results:

First. The present writ of error does not involve substantially any Federal question at all. When the defendant in the court below failed to allege the facts showing its right to rely upon a supposititious infringement of the Fourteenth Amendment and failed to point out specifically to the court that it did rely upon such an infringement, it lost its right to prosecute a writ of error to this court upon the authority of the following cases:

Detroit R'y Co. v. Guthard, 114 U. S. 134.
Brown v. Colorado, 106 U. S. 95.
Susquehanna Boom Co. v. W. Branch Boom Co., 110 U. S. 57.
Fowler v. Lamson, 164 U. S. 255.
Chappel Chem. Co. v. Sulphur Mines Co., 172 U. S. 471.
Clark v. Pennsylvania, 128 U. S. 397.
O'Neil v. Vermont, 144 U. S. 335.
Bonner v. Gorman, 213 U. S. 86.
Mutual Life Ins. Co. v. McGrew, 188 U. S. 291.

I am aware that this court has held that where a State court of last resort undertakes to deal seriously with the Federal question made in a petition for rehearing that this court may take jurisdiction and pass upon the Federal question.

I most respectfully submit to Your Honors that the case of Mallett v. North Carolina, 181 U. S. 589, and the line of cases which have followed it, can not possibly be applicable where it was necessary in order to raise

the Federal question that the defendant should have alleged that other corporations similarly situated were not taxed and therefore that there was a substantial discrimination against the plaintiff in error. Where the Federal question involved only arises by the allegations of facts creating the discrimination, it can not be made in a petition for rehearing which can not import into the record any facts or issues not shown by the record.

Second. If it should be found the plaintiff in error is properly in this court, then there is absolutely no right pertaining to it which has been infringed by the courts of the State of Kentucky.

The method of keeping books in the Auditor's office is not, of course, a Federal question. The statutes imposing a liability upon any corporation which owns, controls, leases or operates a railroad having been enacted before the plaintiff in error took possession of the Chesapeake, Ohio & Southwestern Railroad under the power of attorney, I take it, can not be seriously asserted that any Federal question is involved in rendering a personal judgment against the plaintiff in error for the taxes complained of.

Respectfully submitted,

T. L. EDELEN,
For Defendant in Error.

Of Counsel:

JAMES BREATHITT,
Attorney-general, Commonwealth of Kentucky.
ROBT. B. FRANKLIN,
CLEM J. WHITTEMORE,

does not deprive those parties of any constitutional rights where no ground is shown for impugning the assessment so made.

The Federal Constitution does not preclude a State from requiring a corporation actually controlling and exercising a franchise to pay the tax legally assessed thereon, although not the actual owner of the franchise.

When the record does not show that others similarly situated escaped the taxation imposed on the plaintiff in error, and the state court has declared that if any escaped they are still liable, this court regards the contention of denial of equal protection of the law as without merit.

128 Kentucky, 628, affirmed.

THE facts, which involve the validity of an assessment, are stated in the opinion.

Mr. Edmund F. Trabue, with whom *Mr. Blewett Lee*, *Mr. John C. Doolan* and *Mr. Attilla Cox, Jr.*, were on the brief, for plaintiff in error:

This court has jurisdiction if the state court decided the Federal questions, although first appearing in the petition for rehearing. *Mallett* v. *North Carolina*, 181 U. S. 589, 592; *Leigh* v. *Green*, 193 U. S. 79, 85; *Sullivan* v. *Texas*, 207 U. S. 416, 422.

Even if the envelope indorsement were a record of assessment, the assessment would, nevertheless, deny due process and equal protection because all other railroads of the State were assessed and paid franchise taxes upon a different basis, or method of assessment. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20.

There is nothing to indicate that the State proposes or ever intends to attempt to undo as to the other companies its action of 1899, and both cannot stand. The case is one of spoliation pure and simple, of an arbitrary exaction without justice or reason. *Railroad Co.* v. *Board*, 85 Fed. Rep. 302, 303; *Nashville &c. Co.* v. *Taylor*, 86 Fed. Rep. 168; *Louisiana Trust Co.* v. *Stone*, 107 Fed. Rep. 305; *National Bank* v. *Kimball*, 103 U. S. 732, 735; *Stanley* v.

Supervisors, 121 U. S. 535, 550; *San Francisco Bank* v. *Dodge*, 197 U. S. 70, 81; *Coulter* v. *Railway Co.*, 196 U. S. 599, distinguished; and see *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337.

An assessment is the first element of due process in tax proceedings. Taxation is taking property *in invitum*. It is an exercise of sovereignty. It involves the power to destroy. It must, therefore, be according to due process.

Plaintiff in error was not assessed by the jacket memoranda relied on for the amount sued for, and it is not claimed that there was any assessment against it, or any record of such an assessment. There was no assessment, however, against anyone. The jacket memoranda were simply memoranda for the Board's convenience. It does not appear who made the memoranda, nor for what purpose. A record must have permanency. The Memoranda indorsed upon envelopes have none. Permanency is essential to a tax record as the foundation of title.

Not only is permanency essential to the conception of a record, but every essential proceeding must appear in some written and permanent form in the records of the bodies authorized to act upon them. *Moses* v. *White*, 29 Michigan, 59, 60; 1 Cooley on Taxation, 3d ed., 576, 597; *Clegg* v. *State*, 42 Texas, 610; *Roberts* v. *First National Bank*, 8 N. D. 504; *State* v. *C. & D. Ry. Co.*, 54 S. Car. 564; *Commonwealth* v. *Railroad Co.*, 104 Pa. St. 89; *Wells* v. *McHenry*, 7 N. D. 246.

This defect of jurisdiction cannot be remedied by curative statute. *McReynolds* v. *Longenberger*, 57 Pa. St. 13; *Flannagan* v. *Dunne*, 105 Fed. Rep. 828; *Slaughter* v. *City*, 89 Kentucky, 112, 121; see *Powers* v. *Fuller*, 30 Iowa, 476, 477; *Cassidy* v. *Young*, 92 Kentucky, 227, 232; *Turner* v. *Pewee Valley*, 100 Kentucky, 288, 291; *Pratt* v. *Breckinridge*, 112 Kentucky, 15; *Alexander* v. *Aud*, 120 Kentucky, 105; *Wildharber* v. *Lunkenheimer*, 128 Kentucky, 344, 349.

If a tax liability can be established upon such a basis as this the fortunes of all men are in jeopardy. *Western*

Union Telegraph Co. v. *Howe*, 180 Fed. Rep. 44, 52; *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock*, 204 U. S. 585, 593.

Where a tax is levied on property in proportion to its value as determined by a board of assessors, due process of law requires that there be a listing of the property and its valuation as assessed upon a public record. *Allen* v. *McKay*, 139 California, 94; *Thurston* v. *Little*, 3 Massachusetts, 429; *People* v. *Hagadorn*, 104 N. Y. 516; *State* v. *Wabash Ry. Co.*, 114 Missouri, 1; *Kelly* v. *Herrell*, 20 Fed. Rep. 364, 369; *Perkins* v. *Longmaid*, 36 N. H. 507; *People* v. *Weaver*, 100 U. S. 545. As to what is a record see 34 Cyc. 585; 24 Am. & Eng. Ency. of Law, 172; *State* v. *Anderson*, 30 La. Ann. 557, 567; *Heintz* v. *Thayer*, 92 Tex. Sup. Ct. Rep. 658, 50 S. W. Rep. 929.

The entries on the envelopes were not records. Cooley on Taxation, 600. This tax is invalid because it was not made to appear that this board of assessment ever actually assessed the property now charged with the tax. *Pennsylvania R. R. Co.* v. *Montgomery County Pass. Ry. Co.*, 167 Pa. St. 62; *McReynolds* v. *Longenberger*, 57 Pa. St. 13; *Howes* v. *Gillett*, 23 Minnesota, 231; *Hopper* v. *Malleson*, 16 N. J. Eq. 382.

In order for property of a person to be taken from him for the purposes of taxation, a record showing that he has been assessed is just as necessary as a record showing that there was a tax to assess against him.

As to the history of the rule requiring a record, see Art. 37 of Magna Charta in Stat. at L. in the form made in the ninth year of Henry III, confirmed by Edward I, twenty-fifth year of his reign. Dowell's Hist. of Taxation, Eng.; Domesday Book and Beyond; chap. 33, Geo. III, p. 26, Statutes at Large of England, and numerous state statutes in this country.

Due process of law forbids holding the agent for the principal's franchise taxes. Barbour & Carroll's Statutes,

§ 4077. The assessment, if any, is against the Chesapeake Company. The Illinois Company was never the agent of this company so far as operating the property was concerned. *Carstairs* v. *Cochran*, 193 U. S. 10; *Thompson* v. *Kentucky*, 209 U. S. 340; *Hannis Dist. Co.* v. *Baltimore*, 217 U. S. 285, do not apply.

Judgment *in personam* is beyond the Commonwealth's jurisdiction, and, consequently, a deprival of due process. 1 Black, Judg., § 242; *Munday* v. *Vail*, 34 N. J. L. 418; *Reynolds* v. *Stockton*, 43 N. J. Eq. 211.

There are cases in the state courts denying the right to a judgment which is outside the issues, where the question arose upon appeal, and where, therefore, the Federal question of jurisdiction and due process did not arise. *Husted* v. *Vanness*, 158 N. Y. 154; 52 N. E. Rep. 645; *Burns &c. Co.* v. *Doyle*, 71 Connecticut, 742; 71 Am. St. Rep. 237; *Lincoln Bank* v. *Virgin*, 36 Nebraska, 735; 55 N. W. Rep. 218; 38 Am. St. Rep. 747; *Carter* v. *Gibson*, 47 Nebraska, 655; 66 N. W. Rep. 631; *Seamster* v. *Blackstock*, 83 Virginia, 232; *Wade* v. *Hancock*, 76 Virginia, 620; *Ex parte Lange*, 18 Wall. 163, 175; *Windsor* v. *McVeigh*, 93 U. S. 274; *Hovey* v. *Elliott*, 167 U. S. 409; *Reynolds* v. *Stockton*, 140 U. S. 254; *Wetmore* v. *Karrick*, 205 U. S. 141; *Lumber Co.* v. *Knight*, 217 U. S. 257.

Mr. T. L. Edelin, with whom *Mr. James Breathitt*, Attorney General of the State of Kentucky, *Mr. Robert B. Franklin* and *Mr. Clem J. Whittemore* were on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Commonwealth of Kentucky recovered judgment in this suit against the Illinois Central Railroad Company for the amount of the tax, for the year 1897, upon the franchise formerly belonging to the Chesapeake, Ohio and Southwestern Railroad Company. The recovery

was based upon the fact that the Illinois Central Railroad Company was, at the time to which the tax related, in possession of the railroad, and was operating it under a power of attorney from the purchaser at a judicial sale, and had made the report which was required by the statute relating to the taxation of franchises. The judgment was affirmed by the Court of Appeals of Kentucky. 128 Kentucky, 268. The Illinois Central Company petitioned for a rehearing, and presented the Federal questions now urged under the Fourteenth Amendment of the Constitution of the United States. The court entertained the petition and extended its opinion, holding that no right of the appellant under the Fourteenth Amendment had been violated by the decision. Thereupon this writ of error was brought, and, as the state court passed upon the Federal questions, this court has jurisdiction. *Mallett* v. *North Carolina*, 181 U. S. 589; *Leigh* v. *Green*, 193 U. S. 79.

The validity of the statutes of Kentucky providing for the taxation of franchises is not assailed and nothing is shown which would open to dispute the taxable character of the particular franchise here involved. The plaintiff in error, the Illinois Central Railroad Company, contends that by virtue of the judgment it has been deprived of property without due process of law, *first*, in that there was no assessment upon which to base the recovery of the tax; and *second*, in that it has been held personally liable to pay a tax upon a franchise of which it was not the owner. The plaintiff in error also contends that it has been denied the equal protection of the laws, as it insists that all other railroad corporations were assessed for the purpose of franchise taxation upon a different basis and by a different method, and that, as to other railroad corporations, the assessments similar to the one in question were abandoned.

The gist of the first contention—that there was no

assessment—is that an assessment implies a record and that there was no record but only a memorandum; that an assessment must be a definitive act and that here it was only tentative.

It appears that the railroad of the Chesapeake, Ohio and Southwestern Railroad Company was sold at a judicial sale in the summer of 1896, to Edward H. Harriman, who thereupon, under date of August 19, 1896, executed a power of attorney to the Illinois Central Railroad Company authorizing it "to take charge of the business maintenance and operation of the railroad, . . . together with all the land, real estate, leaseholds easements, . . . and all other corporate property, real and personal lately belonging to the said Chesapeake, Ohio and Southwestern Railroad Company, included in the said sale and conveyance and all the rights, privileges, immunities and franchises whatsoever" which he had acquired. It was expressly authorized to receive "all the earnings of the said railroad," to apply the same to the expenses incurred in its "management, maintenance and operation," and to take all proceedings necessary or expedient for these purposes.

On September 15, 1896, the Illinois Central Company made a report to the Auditor of Public Accounts of Kentucky with respect to the railroad formerly the property of the Chesapeake, Ohio and Southwestern Railroad Company, in accordance with the statute governing the assessment of franchises. This report came before the Board of Valuation and Assessment which was charged under the statute with the duty of making the assessment. It was placed in an envelope, or jacket, on the outside of which a proper form was provided for the entry of the amount of capital, surplus, undivided profits, all other assets, total capital, the amount to be deducted for tangible property, the value of the franchise and the amount of the tax. Below this there were blank spaces for the

insertion of the dates of the first and final notices to the corporation, of the notice to the county clerk and of the payment of the tax. The form upon the jacket was filled out by the insertion of the name of the "Chesapeake, Ohio & Southwestern R. R. Co., Louisville, Ky.," and the date of the report. In the columns provided for the purpose entries were made setting forth the "Total Capital, $6,700,000," "Less Tangible Property, &c., $4,753,339," "Franchise $1,946,661," and "Tax $10,219.97." This is the amount of the tax sued for and recovered in this action.

These entries were made early in the year 1898. The fact that the making of the assessment for the year 1897 was delayed did not detract from the authority and duty to make it. *Southern Railway in Kentucky &c.* v. *Coulter*, 113 Kentucky, 657. That the Board of Valuation and Assessment was authorized to fix the value of the franchise and to make the entries setting forth their determination, and that the entries upon the jacket were in fact made by the Board in the discharge of its duty, do not admit of question. The Commonwealth of Kentucky filed as a part of its petition in the suit a copy of the endorsement on the jacket as a correct copy of the assessment. This was introduced in evidence on the Commonwealth's behalf. The testimony presented in defense did not in any way challenge the authenticity or official character of the jacket entries. On the contrary, the testimony of the former state auditor, who as such was chairman of the Board of Valuation and Assessment, leaves no room for doubt on this point. It also sufficiently appears upon this record, and it is not open to dispute here, that due notice of the assessment was given.

The point urged, in substance, is that the constitutional right of the plaintiff in error has been violated, because the state court has treated the entry on the jacket as a sufficient record of the assessment. It is said that this

cannot be regarded as a record, because it lacks permanency. But this, of course, depends upon the means of preservation and the nature of the filing system adopted. There is no inherent reason why such a record should not be suitably preserved. It is unnecessary to review the numerous authorities which the industry of counsel has collated, for it may be assumed that an assessment should be recorded. It is obvious, however, that the State cannot be denied the right to collect its taxes, and the assessment cannot be held to have been in violation of the Constitution of the United States because for convenience it was recorded—in the form provided for the purpose—upon the jacket inclosing the report of the railroad company, instead of in a separate book. If the Board did not proceed properly to make the assessment according to the statute, the corporation aggrieved had its remedy; if the assessment was otherwise properly made it cannot be defeated because the determination was set forth in the manner described.

The fact that the assessment was entered under the heading "Chesapeake, Ohio & Southwestern R. R. Co., Louisville, Ky.," does not invalidate it. The franchise which was the subject of the assessment had belonged to the Chesapeake, Ohio and Southwestern Railroad Company and the entry suitably identified it. The report which was made by the Illinois Central Company used the same description. The information given by this report, prefacing the amount of capital, value of assets, earnings, etc., is as follows:

"Name of corporation—Chesapeake, Ohio & Southwestern Railroad company.

"Name the principal place of business of the corporation, company or association you represent—Louisville, Kentucky.

"Give the name and official position of the officer making the report.

"Name, J. C. Welling. Position, Vice President, I. C. R. R. Co.—Agt.

"The kind of business in which the said corporation, company or association is engaged.

"Operating Railroad from Louisville, Ky. to Memphis, Tennessee."

The conclusion that the assessment entered in this manner was made in accordance with the law of the State of Kentucky was necessarily involved in the decision of the Court of Appeals. And the fact that, upon the report made by the plaintiff in error in the circumstances stated, the assessment was entered under the name of the company which had formerly owned the franchise furnishes no ground for the contention here that there has been an absence of due process of law. *Castillo* v. *McConnico*, 168 U. S. 674, 682–684; *Witherspoon* v. *Duncan*, 4 Wall. 210.

But it is said that the assessment was only tentative and that the entry was merely a memorandum. It does not appear to be tentative upon its face. That it was such in fact is a conclusion sought to be derived from the testimony of the former state auditor. His testimony was to the effect that he "did not expect any tax to be paid" on the assessment; that the franchise assessments, which were made in 1898, were opposed, that there was considerable discussion of the matter with the railroads, and that finally in 1899 an agreement was reached by which the assessments of 1898 were abandoned. He says that "in the matter of the Illinois Central Railroad Company, we agreed not to assess the C. & O. S. W. for the first two years, we agreed that,—in other words, that the amount we assessed against the Illinois Central should be in full for all the properties they controlled for four years, this assessment, and the one sent out as final in 1898 we reconsidered and declined to assess any franchise tax against that road for one or two years, for the first years, —two years, I think. In other words, the agreement of

the Board was to reconsider these assessments entirely, and take them back, in consideration of the fact that the road would pay the next two assessments on the basis agreed upon." The question is at once presented whether after making the assessment in 1898 the Board had any authority to deal with it in this manner or to enter into such a bargain with the railroad. This is a matter of state law and the Court of Appeals of Kentucky has held that the Board had no such power and that the first assessment stood. In its opinion the court said:

"The board made the assessment in the way that all other assessments were made. It gave notice of the assessment to the railroad company as required by statute and at the end of thirty days it gave notice, as provided by the statute, that the assessment had become final. When this had been done, the matter passed beyond the control of the board. A final assessment had been had as provided by law, and if any injustice was done the taxpayer it was due entirely to his failure to appear before the board and ask a reduction of the assessment. No reliance could be placed in such proceedings if the validity of the record was made to depend upon the secret intentions of the assessing officer. The validity of their actions depends upon what they do and not upon their undisclosed purposes. When the assessment had become final and the Railroad Company owed the State the amount of taxes thus fixed, the assessing officers were without authority afterward to make any agreement with the railroad to the effect that if the railroad would pay the taxes for 1899, they would forego collecting the taxes for the previous years."

And on the petition for rehearing the court added this statement:

"When the board made an assessment and sent out the preliminary and the final notices as provided by the statute that the assessment had been made its action was final

ILLINOIS CENTRAL RAILROAD COMPANY *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 16. Argued October 26, 27, 1910.—Decided December 5, 1910.

If the law of the State permits it, the fact that the making of an assessment is delayed does not detract from the authority or the duty of the assessing power to make it.

The fact that the assessment is made by memoranda on the assessment envelope or jacket, does not render it ineffectual as lacking in due process of law because not recorded in a permanent book, and where the state court has held that an assessment so made is good under the law of the State, this court will not hold that it denied the party assessed due process of law or equal protection of the law.

A construction by the state court that an assessment made by the board of assessors cannot enter into an arrangement with the parties assessed contemplating the non-payment of the tax based thereon

and the legal effect of its action must depend on what they did and not on the secret intentions of the Auditor."

This construction of the powers of the state officers under the statutes of the State relating to franchise assessments—this determination with regard to the finality of the assessment in question—does not violate any constitutional right of the plaintiff in error. The assessment was made in accordance with the law of the State; it was, under that law, a final assessment and no ground is shown here for impugning it.

It is insisted further that the enforcement of the tax by a judgment *in personam* against the plaintiff in error constitutes an unconstitutional deprivation of property, that is, assuming that under the statutes of the State, as construed by its highest court, the plaintiff in error was liable for the tax, nevertheless it could not properly be held because it was not the owner of the franchise upon which the tax was laid. But by virtue of the arrangement with the purchaser at the judicial sale the plaintiff in error was operating the railroad and was in possession and full control of the railroad property and its earnings. It cannot be doubted that under the Federal Constitution the State is not precluded from fixing liability for the payment of the tax, to which the franchise is subject, upon the corporation actually exercising the franchise within the State and in control of the railroad property and its earnings. There is no constitutional obligation requiring it to look further in order to secure payment of the tax which it is entitled to levy. *Carstairs* v. *Cochran*, 193 U. S. 10, 16; *National Bank* v. *Commonwealth*, 9 Wall. 353.

It is also contended that plaintiff in error has been denied the equal protection of the laws upon the ground that other railroad corporations have not been assessed upon the same basis or by the same method, or have not been held to the payment of taxes upon such an assessment. This defense was not pleaded in the answer of the

Illinois Central company, and, in any event, the meager testimony introduced at the hearing is utterly insufficient to afford a basis for the argument. It does not satisfactorily appear that other railroad corporations were not assessed in the same way and at the same time, or, assuming that they were so assessed, that they are not liable to pay taxes accordingly. The Court of Appeals of the Commonwealth in denying the petition for a rehearing said: "As shown by the opinions of this court cited in the opinion herein, taxes have been imposed based on the assessments in controversy. All other tax-payers than railroads were taxed and if some railroads escaped, it is no reason that others should go free while all tax-payers of other classes paid their taxes. If any railroads escaped they are still liable for their taxes unless barred by limitation."

No conclusion to the contrary is justified by the record and the contention that the plaintiff in error has been denied the equal protection of the laws, as the case lies before us, is without merit.

Judgment affirmed.